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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1958

No. 291

MURRAY WHITFIELD COULTER and
GEORGE PROTHRO COULTER, ... Appellants

v.

GARLAND ANTHONY, FAY FURLOW, JAMES ABBOTT, FURLOW-ABBOTT COMPANY, a Corporation, RUTH JONES ROBERTS, MOLLIE FRED JONES PUDEPHATTE, LIZZIE LOU JONES PUDEPHATTE, JAMES DAVID JONES, WILLIAM R. ARENDT, EUGENE F. GALLOWAY, EDWIN WILSON ANTHONY, LOUISE J. ANTHONY, E. H. GILL and
M. B. GARRISON, ... Appellees

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF ARKANSAS

JURISDICTIONAL STATEMENT

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PURPOSE OF STATEMENT

Appellants appeal from that part of the decree of the Supreme Court of the State of Arkansas (hereinafter referred to as the State Supreme Court) adverse to them entered on November 4, 1957, affirming (in part) the

decree of the Chancery Court of Calhoun County, Arkansas (hereinafter referred to as the trial court), and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the trial court was dated April 19, 1956, and was filed as a preamble to the decree on May 16, 1956. Opinions and decrees of trial courts in Arkansas are not officially reported. Copies of the opinion and decree are attached hereto as Exhibits A-1 and A-2, respectively, to Appendix A. The opinion of the State Supreme Court was filed on November 4, 1957, is reported in (Ark.) 308 S. W. (2d) 445, and a copy thereof is attached hereto as Exhibit A-3 to Appendix A. Petition for rehearing was timely filed on November 20, 1957, and was overruled on January 20, 1958. Copies of both the petition and the opinion thereon are attached hereto as Exhibits A-4 and A-5, respectively, to Appendix A. Copy of the final decree of the State Supreme Court is attached hereto as Exhibit A-6 to Appendix A. Copy of the unreported Findings of Fact and Conclusions of Law of the United States District Court for the Western District of Arkansas, in United States of America v. 68,000 acres of land, affecting a portion of the original acreage from which the lands here involved were a part, is attached hereto as Exhibit A-7 to Appendix A; and reference is made to the adverse decision of the State Supreme Court in Coulter v. O'Kelly, 226 Ark. 836, 295 S. W. (2d) 753 [since repudiated, in at least one important point involved, in Griffin v. Isgrig, (Ark.) 302 S. W. (2d) 777, 780], likewise affecting a portion of the original block covered by the conveyance to appellants.

JURISDICTION

This suit was brought by appellants under sections 37-101 and 37-226, Statutes of Arkansas, (1947) Annotated (hereinafter the Arkansas statutes will be referred to by section number only), to cancel void tax deeds beclouding their title, and 84-1117, requiring them, if successful in their cancellation action, to pay the accrued taxes against the lands as a condition of redemption.

The decree of the State Supreme Court entered pursuant to the opinion of November 4, 1957, became final on January 20, 1958, on the denial of the petition for rehearing and the entry of a substituted decree on that date, and the Notice of Appeal was filed in that court on April 9, 1958. The time for filing the certified copy of the Record and the Jurisdictional Statement in this Court was extended (R. 137, 148, 149) to August 25, 1958.

Jurisdiction of the Supreme Court of the United States to review by direct appeal the decision on the question raised as to Act 142 of the Arkansas Legislature of 1935 (hereinafter the acts of the Arkansas legislatures will be referred to merely by the act numbers and years of enactments), brought into question as being repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, and the validity of which was sustained, is conferred by Title 28, United States Code, Section 1257(2); and jurisdiction to review the additional accompanying questions, federal and state, interwoven therewith, is conferred by Sections 1257(3) and 2103 of said Title.

The following decisions sustain the jurisdiction of this court to review the decree on direct appeal: *Home Insurance Company of New York* v. *The City Council of Augusta*,

Georgia, 93 U. S. 116, 121, 23 L. Ed. 825, 826; *Kansas City So. R. Co.* v. *Road Improvement District*, 256 U. S. 658, 660, 65 L. Ed. 1151, 1156, 41 S. Ct. 604; *Standard Oil Company* v. *Johnson*, 316 U. S. 481, 482, 483, 86 L. Ed. 1611, 1614, 62 S. Ct. 1168; and the following cases sustain the jurisdiction to review the questions, both federal and state, not directly appealable, but interwoven with, and made an integral part of, the appealable question: *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, 541, 66 L. Ed. 1044, 1055, 42 S. Ct. 516; *Sterling* v. *Constantine*, 287 U. S. 378, 393, 394, 77 L. Ed. 375, 383, 53 S. Ct. 190; *Flournoy* v. *Wiener*, 321 U. S. 253, 263, 88 L. Ed. 708, 715.

STATUTES INVOLVED

The statutes involved herein are set out as exhibits B-1 to B-14 to Appendix B hereto, to-wit: sections 37-101 (Ex. B-1), 37-226 (Ex. B-2), and 84-1117 (Ex. B-3), Statutes of Arkansas, Annotated (1947), under which this action was originally brought; Sections 1257(2) and (3) (Ex. B-4), and 2103 (Ex. B-5) of Title 28, United States Code, conferring jurisdiction on the Supreme Court of the United States to review the decree appealed from; Act 142 of 1935 (Ex. B-6), directly assailed as being unconstitutional, and from the decision on which this appeal is taken; its repealing act, Act 264 of 1937 (Ex. B-7); and sections 70(a) (Ex. B-8), 64(a) (Ex. B-9), and 57(n) (Ex. B-10) of the bankruptcy act, Section 5 of Article 16 of the Constitution of Arkansas (Ex. B-11), Act 92 of 1887 (Ex. B-12) (amended on several occasions, and, as amended, incorporated in our successive codes as sections 5763 of Mansfield's Digest, 7086 of Kirby's Digest, 13848 of Pope's Digest, and 10085 of Crawford & Moses' Digest, the code

in effect at the time of the transactions involved herein), Act 172 of 1929 (Ex. B-13), and Act 72 of 1931 (Ex. B-14).

QUESTIONS PRESENTED

1. Whether the sale for taxes by the sheriff to the State in June, 1932, of the lands involved herein was void as to all or any part of said lands by reason of jurisdictional defects that could not be cured by legislative enactment (without repugancy to the provisions of the 14th Amendment to the Constitution of the United States), to-wit: (1) The sale was made while the lands were exclusively in the custody and control of the bankruptcy court as assets of the bankrupt estate, without leave of said court, for a claim provable in bankruptcy, but never proved or filed, in contravention of the provisions of sections 70(a), 64(a) and 57(n) of the bankruptcy act, and in conflict with the decisions of the Supreme Court of the United States, the United States Court of Appeals for the Eighth Circuit, the United States District Court for the Western District of Arkansas, and the Supreme Court of Arkansas; (2) The county clerk failed to execute and file his certificate to the publication of the notice of sale within the time required by Act 92 of 1887 (Section 10085 of Crawford & Moses' Digest), as said act has been construed by the Supreme Court of Arkansas and by the Supreme Court of the United States; (3) Six of the forty-acre parcels that had been separately assessed pursuant to the mandatory provisions of Act 172 of 1929 were combined and extended by the clerk as three parcels of two forties each for the combined tax against both, and were so sold in combination by the sheriff, without statutory authority, contrary to the weight of authority, to the established rule in Arkansas, to the provisions of Section 5 of Article 16 of the Constitution of Arkansas, and to the applicable decisions of the Supreme Court of the United States.

2. Whether, based on the erroneous decisions on points "(1)", "(2)" and "(3)" of question "1", adopted and interwoven into the decision on this question, as the basis therefor, the construction placed upon and the retroactive application made of Act 142 of 1935, which, as construed and applied, was deemed to cure jurisdictional defects and to validate a void sale, and to deprive appellants of property and rights which they owned and had at the time of its enactment, and which, by reason of their minority and the protection guaranteed to them under sections 37-101 and 37-226, Arkansas Statutes, Annotated (1947), they would still own and have except for the intervention of said Act, as construed and applied, rendered said Act void as being repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, and as depriving appellants of their property and rights without due process of law, contrary to the rights guaranteed to them under the provisions of said Amendment, and as being in conflict with the applicable decisions of the Supreme Court of the United States, the United States Court of Appeals for the Eighth Circuit, the District Courts of the United States and the Supreme Court of Arkansas.

STATEMENT

Under Arkansas law there are two separate and distinct procedures for redeeming from tax sales: one (under sections 84-1201 and 84-1211) under which the right to redeem is absolute without regard to whether the tax sale or deed was void or valid; and the other (under sections 37-101 and 37-226) under which the cancellation of the tax deed as void is a prerequisite before redemption can be accomplished pursuant to Section 84-1117. This case falls in the latter class; and, in the language of the State Supreme Court (Opin., Ex. A-3), "If appellants are to prevail, they must show that the 1932 tax sale was void."

BASIC FACTS

Harris Brothers, a copartnership, and John R. Harris individually, one of the partners, were adjudged bankrupts on January 23, 1932 (R. 79); and, prior to the transactions here under review, W. A. G. Woodward was appointed trustee for the consolidated bankrupt estate. The lands involved in this action (with other lands) were among the assets of the estate (R. 80), and the trustee took possession and assumed control thereof. The taxes on the lands for the year 1931 had not been paid. The tax claim was not proved or filed in the bankruptcy court; but, on June 13, 1932, without leave of the bankruptcy court (R. 81), the lands were sold by the county sheriff to the state for the 1931 taxes (R. 77-H). On August 16, 1933, the referee in bankruptcy entered an order (R. 99) authorizing the sale of the lands by the trustee to E. W. Prothro; and, on August 17, 1933, W. A. G. Woodward, the trustee, conveyed the lands (along with other lands) to Prothro (R. 13-A). On August 28, 1933, Prothro conveyed the lands (with other lands conveyed to him) to appellants herein (R. 17), who were at that time, one and three years of age, respectivly. The state, at different times between November 25, 1935, and May 9, 1936, during which period Act 142 of 1935 was on the statute books, conveyed the lands involved in this appeal to appellees, or their predecessors in title.

HOW FEDERAL QUESTIONS RAISED AND PASSED ON IN STATE COURT

On April 16, 1952, appellant Murray Whitfield Coulter, by his statutory guardian, and appellant George Prothro Coulter, in his own proper person, filed their action (R.

1-6) in the Chancery Court of Calhoun County, Arkansas, to cancel the deeds held by appellees (and their predecessors in title), and to redeem from the taxes against the lands. The questions presented in this appeal, except the specific formal constitutional question presented, were raised in the pleadings filed by appellants in the trial court, it being alleged as grounds for the cancellation of the deeds assailed that the plaintiffs were minors; that the tax sale from which the deeds emenated was void, in whole or in part, for the reasons (1) that the lands were sold without leave of the bankruptcy court while in the exclusive custody and control of that court (R. 2); (2) that the clerk failed to execute and file his certificate to the publication of the notice of sale prior to the date of sale (R. 3); (3) that six of the forty-acre parcels that had been separately assessed were combined by the clerk on his records into three parcels of two forty-acre parcels each for the combined tax against both, and were so sold in combination by the sheriff (R. 32-33); and (4) that one of the forty-acre parcels was sold for an amount in excess of the tax, penalty and interest due (R. 3).

Defendants in the trial court interposed general denials, asserted ownership of the lands under the tax deeds assailed by plaintiffs, interpleaded the statutes of limitations as a defense, alleged that the defects complained of were mere irregularities cured by Act 142 of 1935, and that plaintiffs were not the real parties in interest, and, therefore, could not maintain their action.

Under the Arkansas practice (Section 27-1131), "There shall be no reply except upon the allegation of a counter-claim or set-off in the answer." The cause, therefore, was submitted on the pleadings thus made up.

The record made in the trial court showed that the

plaintiffs were minors (R. 56); that the lands involved were assets of the bankrupt estate (R. 92); that they were sold while they were in the custody of the court (R. 80); that no leave of the bankruptcy court to sell the lands for taxes was obtained or sought (R. 81); that the clerk failed to execute and file his certificate to the publication of the notice of sale within the time required by law (R. 77-H); that six of the forty-acre parcels that had been separately assessed were combined by the clerk on his records for the amount of taxes against both forties, and were so sold in combination by the sheriff (R. 73-4); and that one of the forty-acre parcels was sold for an amount in excess of that due.

"The chancellor, without reaching the question of whether the tax titles are valid, held that the appellants are not the real parties in interest and dismissed the complaint for that reason" (Decree, November 16, 1956, Ex. A-2; Opin. S. Ct., November 4, 1957, Ex. A-3)—and passed on none of the other issues raised in the pleadings or proof.

From the decree of the trial court, plaintiffs, in apt time, perfected their appeal to the Supreme Court of Arkansas. That court reversed the decision of the trial court on the question of the proper parties in interest (Ex. A-3), from which reversal no appeal was taken by appellees, held the pleas of the statutes of limitations asserted by appellees to be untenable, and, pursuant to the practice in that jurisdiction, proceeded to determine the remaining issues *de novo* on the record presented, holding: (1) that the sale of the lands without leave of the bankruptcy court while they were in *custodia legis* merely rendered the sale voidable, not void, and that "It would be carrying the rule beyond its reason to say that the absence of prior judicial consent rendered this sale void"; (2) that the failure of

the clerk to execute and file his certificate to the publication of the notice of sale within the time and in the manner required by law is a defect which, "In the absence of a curative act * * * renders the sale void"; that, as to the lands not sold by the state while Act 142 of 1935 was on the statute books (R. 124, 130), since appellants then owned the land they were entitled to bring their suit within three years after reaching their majority"; but that, as to the other lands, "Our prior decisions indicate pretty clearly that the defect was a mere irregularity", and that "the clerk's failure to make the certificate before the day of sale is an irregularity cured by Act 142"; (3) that the sale of the six forty-acre parcels that had been separately assessed as three parcels of eighty acres each for the combined amount of taxes assessed against both "presents a point of first impression"; but, "In the peculiar circumstances of this case we cannot say that the clerk's procedure, if it was erroneous at all, was more than an irregularity cured by Act 142"; and (4) that, as to the sale of the one forty-acre parcel for an amount in excess of that due, "the excess was less than one cent and does not invalidate the sale."

Upon the Supreme Court's filing its opinion, appellants, in apt time, filed their petition for rehearing (Ex. A-4), in which they alleged error as to the decision on all the points urged, pointing out particularly that the decision on the federal question of the effect of the sale of the lands without leave of the bankruptcy court while they were in the exclusive custody of that court was contrary both to federal legislation and the federal decisions, and, for the first time, specifically asserted that "Act 142 of the Acts of 1935, * * * as applied to the facts of this case" deprived "appellants of their property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States." The charge

of "denial of appellants' constitutional rights" and the "taking of appellants' property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States" was directed also to points "(2)" and "(3)", above, but not to point "(4)". Act 142 of 1935 was also specifically brought in question as to point "(2)".

The Supreme Court entertained the petition for rehearing, reaffirmed its original decision on point "(4)" involving the sale of one forty-acre parcel for an excess amount, which point is not urged in this appeal, but remained wholly silent on the other points (Ex. A-5).

THE QUESTIONS ARE SUBSTANTIAL

Because of the peculiar facts of the case, the specific and express raising of the constitutional question for the first time in the petition for rehearing was in apt time. *Illinois Central R. Co.* v. *Kentucky*, 218 U. S. 551, 556, 54 L. Ed. 1147, 1148, 31 S. Ct. 95; *Saunders* v. *Shaw*, 244 U. S. 317, 320, 61 L. Ed. 1163, 1165, 37 S. Ct. 638; *Missouri* v. *Gehner*, 281 U. S. 313, 319, 74 L. Ed. 870, 875, 50 S. Ct. 326; *Brinkerhoff-Faris Tr. Co.* v. *Hill*, 281 U. S. 673, 677, 678, 74 L. Ed. 1107, 1111, 1112, 50 S. Ct. 451; *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U. S. 358, 366, 367, 77 L. Ed. 360, 366, 367, 53 S. Ct. 145. And the mere denial of the petition for rehearing by the Supreme Court, without any discussion of the issues here presented, was sufficient to give this Court jurisdiction to review. *Chapman* v. *Crane*, 123 U. S. 540, 548, 31 L. Ed. 235, 238, 8 S. Ct. 211; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 231, 232, 41 L. Ed. 979, 983, 17 S. Ct. 381; *A., T. & S. F. R. Co. v. California*, 346 U. S. 346, 349, 98 L. Ed. 51, 58.

1. Substantial reviewable and reversible error was committed by the state courts on these points:

(1) The question of the effect of the sale of the lands without leave of the bankruptcy court while they were in the custody of that court arises under a federal statute and is a federal question. *New Jersey* v. *Anderson*, 203 U. S. 483, 491, 51 L. Ed. 284, 287, 27 S. Ct. 137; *Kalb* v. *Feuerstein*, 308 U. S. 433, 438, 84 L. Ed. 370, 374, 60 S. Ct. 343; *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 483, 86 L. Ed. 1611, 1615, 62 S. Ct. 1168. It is an important question of substance and merit, controlled by both federal statute and decisions, and decided by the Arkansas Supreme Court, for the first time in its history, in a manner contrary to both the federal statute and the decisions, and in conflict with the decisions of the appellate federal courts since the date of the decision in *Isaacs* v. *Hobbs Tie & Timber Co.*, *post*, in 1931. The holding (Ex. A-3) "that the sale was voidable not * * * void", is in direct conflict with the decision in *Wiswall* v. *Sampson*, 55 U. S. (14 How.) 50, 66, 68, 14 L. Ed. 322, 328, 329, in which it is said that, "where the subject matter of the suit in equity is real estate which is taken into the possession of the court * * * the title is bound from the filing of the bill; and any purchaser, pendente lite, even for a valuable consideration, comes in at his peril. * * * no sale of the property can take place, either on execution or otherwise * * * we hold that the sale by the marshal * * * was illegal and void, and passed no title to the purchaser"; and in *In re Brooks*, 91 F. 508, 509, where it is said that, "In any view, the sales after the bankruptcy proceedings were unlawful and void and conveyed no title."

The holding (Ex. A-3) that "There was no federal statute prohibiting the sale or requiring the tax collector to obtain permission to sell the property" is in conflict with the provisions of Section 70(a) of the bankruptcy act which provides that "the trustee * * * shall * * * be vested by

operation of law with the title of the bankrupt as of the date of the filing of the petition."

"Sole jurisdiction in bankruptcy is by the Constitution lodged in the National Government. That power, when given expression in legislation by Congress, is paramount and transcends and supersedes all state laws" — whether statutory or the result of judicial determination. *In re Chicago Rapid Transit Co.*, 129 F. (2d) 1, 4 (C. A. 7). The determination made by the State Supreme Court here is also in conflict with the decisions of this Court in its construction of the federal law in the following cases: *Dayton* v. *Stanard*, 241 U. S. 588, 589, 60 L. Ed. 1190, 1192, 36 S. Ct. 695; *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 737, 75 L. Ed. 645, 661, 662, 663, 664, 51 S. Ct. 270, where it was held that "The title and right of possession * * * vests in the trustee as of the date of the filing of the petition * * *. It follows that the bankruptcy court has exclusive jurisdiction * * *. When this jurisdiction has attached the court's possession cannot be affected by actions brought in other courts"; *Ex Parte Baldwin*, 291 U. S. 610, 615, 78 L. Ed. 1020, 1023, 54 S. Ct. 551; the Findings of Fact and Conclusions of Law attached to Appendix A as Exhibit A-7, affecting a part of the lands of which those involved in this action were a part; *Hooper* v. *Missouri Pacific R. Co.*, 206 Ark. 821, 177 S. W. (2d) 755 ("In *Eldridge* v. *White & Black River Val. Railroad Company*, 194 Ark. 800, 109 S. W. 2d 658, we recognized that by the provisions of the National Bankruptcy Act the court in which any proceedings are pending acquires exclusive jurisdiction of the debtor and its property wherever located. * * * See also *Chicago, R. I. & P. Railroad Company* v. *City of Owatonna*, 8 Cir., 120 F. 226, and *Ex Parte Baldwin*, 291 U. S. 610, 54 S. Ct. 551, 78 L. Ed. 1020."); and *Carson* v. *Missouri Pac. R. Co.*, 208 Ark. 393, 186 S. W. (2d) 435.

The conclusion that (Ex. A-3) "It is quite apparent that the tax sale did not interfere in any way with the bankruptcy court's control and possession of the property" is in conflict with the decisions in these cases: *In re Brooks*, 91 F. 508, *supra*, and *In re Eppstein*, 156 F. 42, 43 (C. A. 8), in which this very contention was made and explicitly rejected.

The conclusions that (Ex. A-3) "some affirmative action on the court's part is needed if the sale is to be avoided" and that there is not "any decision holding that the mere failure of the taxing authorities to obtain permission for the sale and renders the tax forfeiture absolutely void and open to collateral attack" are squarely in conflict with the following decisions: *In re Brictson Mfg. Co.*, 25 F. (2d) 794, 803 (C. A. 8), in which a tax deed had been executed covering property in the hands of a receiver appointed by a court that had no jurisdiction; and, after dissolution of the receivership, the former owners brought suit to recover the land and prevailed, the court saying: "This property was in custodia legis, even though the court had no jurisdiction to appoint the receiver, * * *. As the property was in custodia legis, a tax deed to the property could not be lawfully procured, and such a deed, if procured, is void"; *Chicago, R. I. & P. R. Co.* v. *City of Owatonna*, 120 F. (2d) 226, 227 (C. A. 8), in which the City of Owatonna sought by condemnation under its right of eminent domain to alienate property in the custody of the bankruptcy court without leave to do so, and the defense of lack of jurisdiction was squarely raised, and expressly sustained; *Ex Parte Baldwin*, 291 U. S. 610, 615, 616, 54 S. Ct. 551, 78 L. Ed. 1020; *Kalb* v. *Feuerstein*, 308 U. S. 433, 84 L. Ed. 370, 60 S. Ct. 343, a case under Section 75 of the Bankruptcy Act, which is definitely determinative of the question here presented, unless there is to be a distinction drawn between

the "exclusiveness" of the jurisdiction conferred by Section 75 and that conferred by other sections of the Act; and we can draw no such distinction.

"In determining the extent of the bankruptcy power, it matters little whether we consider the precedents under the original act or under Sections 75, 77 or 77B, for the intent and purport of all bankruptcy legislation, so far as the power to protect the estate is concerned, is largely declaratory of certain recognized equitable principles, namely: the power of a court of equity to protect property in its custody." — *In re Chicago Rapid Transit Co.*, 129 F. (2d) 1, 5 (C. A. 7).

The effect of the sale (Ex. A-3) "subject to the delinquent taxes against the land" is without significance here. It is the validity of the sale, not of the tax, that is in question. The sale had already become an accomplished fact. Appellants concede that they are under statutory obligation to pay any legal taxes that are due. The question of whether the failure to prove the tax claim, which was a provable claim under Section 64(a) of the bankruptcy act (*New Jersey* v. *Anderson*, 203 U. S. 483, 487, 488, 51 L. Ed. 284, 286, 27 S. Ct. 137; *Gardner* v. *New Jersey*, 329 U. S. 565, 572, 573, 91 L. Ed. 504, 514, 515, 67 S. Ct. 768), but was not proved within the time allowed by Section 57(n) of the Act, or at all, was a waiver of the claim (*Summe* v. *Chapman Dairy Co.*, 238 F. (2d) 3, 7; *New York* v. *Irving Trust Co.*, 288 U. S. 329, 330, 331, 77 L. Ed. 815, 817, 53 S. Ct. 389), and, if so, whether that destroyed the tax lien, may be an open question which has not been, but should be, definitely settled by this Court; but presentation of the question would be more appropriate for the argument on the merits.

(2) The holding of the Supreme Court of Arkansas

to the effect that the failure of the clerk to execute and file his certificate within the time and in the manner required by law was a defect which (Ex. A-3) "In the absence of a curative act * * * renders the sale void" immediately subjects the decision to the test of whether a sale void at the time it was made can be validated by state legislative enactment when the result is to deprive one of his property and rights solely as the result of such legislation.

There are other fatal defects and errors. The holding that (Ex. A-3) "Our prior decisions indicate pretty clearly that the defect was a mere irregularity * * *; that * * * a complete failure to make the required record is a jurisdictional defect not cured by Act 142" * * * but that "the clerk's failure to make the certificate before the day of sale is an irregularity cured by Act 142" is in conflict with both state and federal law, and the purported distinction is an untenable one. The statute was clear and unambiguous and not subject to construction by the court. 50 Am. Jur. 204-5 § 225; *Ex Parte Trapnell*, 6 Ark. 9; *State* v. *Lancashire F. Ins. Co.*, 66 Ark. 466, 51 S. W. 633; *Johnson* v. *Lowman*, 193 Ark. 8, 97 S. W. (2d) 86; *Burrell* v. *State*, 203 Ark. 1124, 160 S. W. (2d) 218; *Re Boggs Rice* Co., 66 F. (2d) 855 (C. A. 4); *Bauer* v. *Commissioner of Internal Revenue*, 145 F. (2d) 338 (C. A. 3); *Holden* v. *Barney*, 5 Wall. 107 (72 U. S.) 107, 18 L. Ed. 518; *United States* v. *Hartwell*, * * * 6 Wall. 395, 396, 18 L. Ed. 832, 833; *United States* v. *Corbett*, 215 U. S. 233, 242, 54 L. Ed. 173, 175, 30 S. Ct. 81; *Sacramento Nav. Co.* v. *Solz*, 273 U. S. 326, 329, 330, 71 L. Ed. 663, 665, 666, 47 S. Ct. 368; *Osaka Shosen Kaisha Line* v. *United States*, 300 U. S. 98, 81 L. Ed. 532, 57 S. Ct. 356. The statute (Ex. B-12) was explicitly mandatory in its terms ("The clerk * * * shall record said list and notice * * * and shall certify at the foot of said record * * * before the second Monday in June then

next ensuing"), and left no discretion with the clerk, or even the court: A "failure to comply with a mandatory provision of a statute renders the proceeding void, and when a mandatory statute is invoked the courts have no discretion in its administration except to enforce it as written." — 82 C. J. S. 869, § 374, and cases cited. The failure of the clerk to act within the time prescribed by the statute was, in law, a total failure to act at all. *Parker* v. *Overman*, 18 How. (59 U. S.) 137, 142, 143, 15 L. Ed. 318, 319, 320.

This very certificate, and the objection here made to it, that it was not filed within the time required by the statute (then Section 5763 of Mansfield's Digest), were under review by this court in *Martin* v. *Barbour*, 140 U. S. 634, 646, 35 L. Ed. 546, 550, wherein the sale was held to be void because "the clerk did not comply with these requirements, especially with those of sections 5763 and 5769."

The decision on this point is in direct conflict with a rule of property in Arkansas, well settled since 1889, to the effect that "the right to redeem lands from a tax sale depends upon the statute in force at the date of the sale." — *Thompson* v. *Sherrill*, 51 Ark. 453, 11 S. W. 689; *Groves* v. *Keene*, 105 Ark. 40, 150 S. W. 575; *Hogg* v. *Nichols*, 134 Ark. 280, 204 S. W. 211, citing cases.

Wallace v. *Todd*, 195 Ark. 134, 111 S. W. (2d) 472, cited by the court, did not sustain the decision on this point. The issue in that case was whether it could be shown by parol evidence that the list and notice, with the required certificate had been filed in time and the certificate had been lost. The comment on the point here was dictum only.

The conclusion (Ex. A-3) that "it is within the power of the Legislature to provide for the rules by which the foregoing exercise of power may be made *both as to time*

and form, and, having the power in the first place to make such rules, * * * the legislature has the power to alter or dispense with the same," is, of course, subject to the limitations that "the legislature could not put aside or override constitutional limitations" * * *, and that "it is not consistent with due process to take away from a private party a right to recover the amount that is due when the act is passed." — *Road Improvement District* v. *Missouri P. R. Co.*, 274 U. S. 188, 190, 71 L. Ed. 992, 994, 47 S. Ct. 563; *Graham* v. *Goodcell*, 282 U. S. 409, 426, 75 L. Ed. 415, 439, 51 S. Ct. 186. The conclusion violates the limitation and the decision in the instant case conflicts with these doctrines.

(3) The decision with respect to the procedures followed in selling six of the forty-acre parcels, separately assessed, but combined and extended by the clerk as three parcels of two forties each, for the combined tax against both parcels, to the effect that (Ex. A-3) "the clerk's procedure, if it was erroneous at all, was * * * an irregularity cured by Act 142", was without statutory authority, contrary to the weight of authority generally, to the rule in Arkansas, to Section 5 of Article 16 of the Constitution of Arkansas, and to the decisions of the Supreme Court of the United States.

No fewer than eighteen of the states have reviewed the particular procedure here assailed, and all have condemned it. No contrary decisions have been found.

There is not (and has not been) any statute in Arkansas authorizing the procedure here attacked. Section 5 of Article 16 of the Constitution of Arkansas provides that "No tax shall be levied except in pursuance of law." The controlling legislation in effect at the time the assessment here involved was made was Act 172 of 1929 (Ex. B-13),

which provided that "not more than one sixteenth section or the approximate thereof shall be entered under one call." The levy was made pursuant to that provision (Ex. A-3). The clerk, in extending the levy, and the sheriff, in making the sale, ignored the mandate, and extended the tax and sold the lands in three parcels of eighty acres each for the tax on both. The Supreme Court justifies this action by citing Act 72 of 1931 (Ex. B-14) which could have had no application here, and which does not touch the point at issue, but merely provides that, as to assessments made thereunder, the clerk may "set down all the subdivisions of each section as they belong to different individuals, or the whole section together if owned by one person and not divided on account of parcels being of different value."

The decision is in direct conflict with a long list of prior decisions of the Arkansas Supreme Court itself, of which the following are representative: *Cocks* v. *Simmons*, 55 Ark. 104, 17 S. W. 594 ("Such a sale is absolutely void, for the collector has no more authority to sell one tract for a tax due upon another than for a store account or other ordinary debt."); *Harris* v. *Brady*, 87 Ark. 428, 112 S. W. 974; *Dansby* v. *Weeks*, 199 Ark. 497, 135 S. W. (2d) 62. In all of these cases, and in the many others, the sales were held void because of the defect here asserted. Still, the court held that (Ex. A-3), "In the peculiar circumstances of this case * * * the clerk's procedure, if it was erroneous at all, was * * * an irregularity cured by Act 142." The "peculiar circumstance" pointed out by the court was the fact that, in the previous cases, "It is clear * * * that the taxes were separately extended against the various tracts, and it was the collector who lumped them together in making the sale! Here, both the clerk and the sheriff joined in violating the mandate of the statute!

The decision is in conflict with the following well established rule:

"Statutes providing for redemption from tax sales always receive a liberal construction. Almost any right, either at law or in equity, in possession or in action, or whether in the nature of a charge or incumbrance on the land, amounts to such an ownership as will entitle the party holding it to redeem." — *Woodward* v. *Campbell*, 39 Ark. 580; *McAllister* v. *Wright*, 197 Ark. 1156, 127 S. W. (2d) 645; *Beck* v. *DeFir*, (Ark.) 296 S. W. (2d) 396.

The decision, both on this point, and on point "(2)", is in conflict with the decisions of the Supreme Court of the United States in principle in numerous respects. "The execution by a public officer of a power to sell lands for taxes must be in strict pursuance of the law under which it is made, or no title is conveyed." — *Thatcher* v. *Powell*, 6 Wheat. 119, 125, 5 L. Ed. 221, 222. "In judicial sales under the process of a court of general jurisdiction, where the owner is a party to the proceedings, and has an opportunity of contesting their regularity at every step, such objections" [one, the failure to file a certificate within the time required by law] "cannot be heard to invalidate or annul the deed in a collateral suit. But one who claims title to the property of another under summary proceedings where a special power has been executed, is bound to show every fact necessary to give jurisdiction and authority to the officer, and a strict compliance with all things required by Statute." — *Parker* v. *Overman*, 18 How. (59 U. S.) 137, 142, 15 L. Ed. 318, 319 (from Arkansas); *Redfield* v. *Parks*, 132 U. S. 239, 33 L. Ed. 327, 10 S. Ct. 83 (an Arkansas case); "When the statute provides for the publication of a notice of sale for taxes, and prescribes the terms of such publication, it must be strictly pursued." — *Martin* v. *Barbour*, 140 U. S. 634, 644, 35 L. Ed. 546, 549,

11 S. Ct. 967; *Gage* v. *Bani*, 141 U. S. 334, 35 L. Ed. 776, 12 S. Ct. 72. "As there must be express statutory authority for selling lands for taxes, and as such sale is in the nature of an *ex parte* proceeding, there must be, in order to make out a valid title, a substantial compliance with the provisions of the law authorizing the sale. A statutory power, to be validly executed, must be executed according to the statutory directions." — *Marx* v. *Hanthorn*, 148 U. S. 172, 180; *Meriwether* v. *Garrett*, 102 U. S. 472, 518.

The State Supreme Court has repeatedly held that the defects urged under both "(2)" and "(3)" are jurisdictional, and such as cannot be cured by legislative enactment. *Carle* v. *Gehl*, 183 Ark. 1061, 104 S. W. (2d) 445 [both defects involved and Act 142 of 1935 urged as curing them ("These are not irregularities but matters of substance which prevent the application of the curative features of the act to those claiming under the tax sale".)]; *Cecil* v. *Tisher and Friend*, 206 Ark. 962, 178 S. W. (2d) 655 ("We think the failure of the clerk to perform this duty as required by Section 13848 of Pope's Digest did avoid these sales, and was a jurisdictional defect."); *Standard Sec. Co.* v. *Republic Min. & Mfg. Co.*, 207 Ark. 335, 180 S. W. (2d) 575 [where the certificate was filed on the date of sale, as in this case ("a substantial, 'meritorious defense' against a claimant under a purchase at a tax sale cannot be denied or cut off by the legislature. * * * As indicated under this holding, § 13874 did not, and could not, cut off appellant's meritorious defense to the tax sale in question.")].

2. The adoption by the Supreme Court of Arkansas of the erroneous decisions on the three foregoing points as the basis for the application of Act 142 of 1935, the retroactive application made of said Act, as based on said deci-

sions, and the construction placed thereon to the effect that it cured the (jurisdictional) defects relied on by appellants and validated a void tax sale conducted under an *ex parte* proceeding, during the disability of appellants because of their minority, and deprived appellants of property and rights which they owned and had at the time of the enactment of Act 142, and which, except for the intervention of said Act, they would still have, renders said Act, as construed and applied, void as being repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, and violates the rights of appellants guaranteed by said Amendment.

The facts and issues upon which the foregoing contention is based are, in their basic essentials, set out in the opinion of the State Supreme Court (Ex. A-3):

"When the present suit was brought one of the plaintiffs was twenty-one and the other was nineteen" (Ex. A-3). * * * "The appellees' constructive possession did not begin until after their purchases from the state in 1937, and since the appellants then owned the land, they were entitled to bring the suit within three years after reaching their majority. The complaint was well filed within the time allowed" (Ex. A-3).

In discussing the effect of the Fourteenth Amendment, 16 C. J. S. at page 1176, § 216, says: "vested property rights are now protected against state action by the provisions of the Fourteenth Amendment that no state 'shall deprive any person of life, liberty or property without due process of law' "; and 11 Am. Jur. 1204 § 375, says that, "In view of this restraint or others, * * * the state cannot by a mere act of the legislature take property from one man and give it to another." And 11 Am. Jur. 1208 § 379, also states the general rule with respect to the so-called curative

act: "A curative statute is necessarily retrospective in character, and may be enacted to cure or validate errors or irregularities in legal or administrative proceedings, *except such as are jurisdictional or affect substantial rights.*" (Italics ours).

"It is not competent by legislation to bring into existence and establish against a party a demand which previously he was neither legally nor equitably bound to recognize and satisfy. On the other hand, it is not competent for the legislature to deprive a party of a right of action accruing to him under the rules of common law, or in accordance with its principles. Therefore the right to redress for illegal arrests cannot be taken away; neither can * * * the right to have a void tax sale set aside." — Cooley on Constitutional Law, Fourth Ed., p. 402. To the same effect is Constitution of the United States of America, Revised and Annotated, 1952 (p. 1034-5), by Edwin S. Corwin, Legislative Reference Service, Library of Congress.

The previous decisions of this Court, arising under the Fourteenth Amendment, amply support the foregoing general statements of the law to the effect that vested rights cannot be destroyed by later legislation.

In *Ettor* v. *City of Tacoma*, 228 U. S. 148, 154, 57 L. Ed. 773, 777, 33 S. Ct. 428, it is said that "It would seem to need no argument to establish the contention that the obligation to make compensation to these plaintiffs in error could not be destroyed by later legislation." In *Ochoa* v. *Hernandez y Morales*, 230 U. S. 139, 57 L. Ed. 1427, 33 S. Ct. 1033, it was held that a statute shortening the period within which possession acquired under an *ex parte* proceeding would ripen into title could be sustained only prospectively and in cases in which there was reserved to

the owner a reasonable opportunity to contest the claim, and that any other construction would permit a taking of property without due process of law. In *Forbes Pioneer Boat Line* v. *Board of Commissioners of Everglades Drainage District*, 258 U. S. 338, 339, 66 L. Ed. 647, 42 S. Ct. 326, the question was, "whether the state legislature can take away from a private party a right to recover money that was due when the act was passed." This Court answered: "Defendant owed the plaintiff a definite sum of money that it had extorted from the plaintiff without right. It is hard to find any ground for saying that the promise of the law that the public force shall be at the plaintiff's disposal is less absolute than it is when the claim is for goods sold. Yet no one would say that a claim for goods sold could be abolished without compensation." In *Graham* v. *Goodcell*, 282 U. S. 409, 426, 75 L. Ed. 415, 439, 51 S. Ct. 186, the decision states the issue as follows: "The question is whether these circumstances remove the case from the operation of the general rule that it is not consistent with due process to take away from a private party the right to recover the amount that is due when the act is passed." It was decided, citing and discussing cases to that effect, that a vested right cannot be destroyed by later legislation. In *Coombes* v. *Getz*, 285 U. S. 434, 76 L. Ed. 866, 52 S. Ct. 435, it is said (syllabus): "The authority of a state under the reserved power to alter or amend laws relating to corporations does not extend to the destruction or impairment of vested property rights or the obligation of contracts of third persons."

The Arkansas cases have consistently adhered to the rule that vested rights could not be divested through legislative action. In *Smith* v. *Spillman*, 135 Ark. 279, 205 S. W. 107, it is said: "Our view of the matter is that a right of redemption does not come within the limits of a mere

remedy, but that it affects substantial rights, and where those rights are acquired before the passage of the statute, they cannot be disturbed." In *Coco* v. *Miller*, 193 Ark. 999, 104 S. W. (2d) 209, it is said: "The Legislature has no power to divest legal or equitable rights previously vested." In *Jenkins* v. *Jenkins*, 219 Ark. 219, 242 S. W. (2d) 124, it is said: "In order to enable the Courts in a decree of divorce to dissolve an entirety estate, the Legislature adopted the Act 340 of 1947. But entirety states created prior to the enactment of that legislation had given the holders vested rights; and absent — as here — any question of police power, the authorities on constitutional law recognize that the Legislature may not retrospectively destroy vested rights." This rule was reiterated in the rather recent case of *Meadows* v. *Costoff*, 221 Ark. 561, 254 S. W. (2d) 472. A meritorious defense has always been considered by the Arkansas Supreme Court as a vested right or interest that could not be cut off by legislation. — *Radcliffe* v. *Scruggs*, 46 Ark. 96; *Standard Securities Co.* v. *Republic Mining & Mfg. Co.*, 207 Ark. 335, 180 S. W. (2d) 575.

The effect of the minority of appellants is an element inherent and implicit in the record, comprised in this question, and raises the issue of whether legislation that deprives one under disability of his property through *ex parte* proceedings comports with the requirements of the due process clause of the Federal Constitution. The decisions in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313, 315, 94 L. Ed. 865, 872, 874, 70 S. Ct. 652, and *Covey* v. *Somers*, 351 U. S. 141, 100 L. Ed. 1021, 76 S. Ct. 753, both judicial proceedings, in the first of which notice was by publication and in the second of which it was by personal service, are to the effect that such service on persons under disability does not meet the due process requirements as the basis for depriving one of his property. The

rule would be more rigidly applied in *ex parte* proceedings.

The case is not precluded by the prior decisions of this Court. The State Supreme Court apparently took the view that this case is controlled by the decision in *Wood* v. *Lovett*, 313 U. S. 362, 85 L. Ed. 1404, 61 S. Ct. 983. That view rests on a misconstruction of the decision in the *Lovett Case*. Act 142 was not under attack in that case. It was conceded that such Act was valid as applied to the facts in that case: "that the defects and irregularities alleged are such as would not justify the Court in setting said tax sale aside under said Act 142, if it were in force." Exactly the opposite contention is asserted in this case: that the defects involved were jurisdictional defects that could not be cured by legislation. In the *Lovett Case*, the real issue was whether a vested interest admittedly legally acquired under an existing statute could be divested merely by the repeal of that statute. Act 142 of 1935, as construed and applied, is repugnant to the provisions of the Fourteenth Amendment to the Constitution for the very reason that the Lovett Case was reversed: it purported to divest an interest that had already vested at the time of its enactment. The decision in this case is, in fact, in conflict with the decision in the *Lovett Case* and the cases cited in support thereof. They are all (though arising under a different Constitutional provision) simply to the effect that vested rights cannot be destroyed by later legislation and that the result must be determined by the law in effect at the time of the transaction.

It is submitted that the questions presented are of importance, and of general and national interest; that a substantial federal question arising under the bankruptcy act as to the effect of the sale of the lands during the minority of appellants, without leave of the bankruptcy

court, while said lands were in the exclusive custody of said court, which question was raised in the pleadings below, was necessary to a determination of the case, not rendered unimportant by any adequate independent state ground or any prior decisions of this Court, and passed on by the State Supreme Court, has been decided in a manner contrary to the federal statutes and in conflict with the decisions of this Court, and in such manner as to leave the law in an uncertain status, and adversely to affect the saleability by a trustee in bankruptcy of any property similarly involved; that an important federal question that has not been definitely settled by this Court, but should be so settled, is presented as to whether the rule announced in the *Feuerstein Case, supra*, to the effect that sales such as that under review here are *ipso facto* void and subject to collateral attack under Section 75 of the bankruptcy act are to be so considered under other sections of the act; that an important federal question that probably has not been definitely and clearly settled by this Court, but should be so settled, is presented with respect to the effect, both on the tax claim and on the attending lien, of the failure to prove the tax claim in the bankruptcy court; that there is presented a substantial federal question as to the effect that the minority of a property owner, who has been deprived of his property through legislative enactment, in an *ex parte proceeding*, has on the constitutionality of such legislation when weighed against the provisions of the Due Process Clause of the Federal Constitution; and that a hearing on the merits should be had to settle these questions.

Respectfully submitted,

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Counsel for Appellants.

APPENDIX A

OPINIONS, DECREES, PETITIONS AND ORDERS

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OPINIONS, DECREES, PETITIONS AND ORDERS

EXHIBIT A-1

OPINION, CALHOUN CHANCERY COURT (dated April 19, 1956, incorporated as a preamble to the Decree, dated May 15, 1956, with which it was filed on May 16, 1956. For convenience in making reference hereto, the opinion or fact-finding and legal conclusion portion is desigated as Exhibit A-1 and the decretal portion as Exhibit A-2.

On this 15th day of May, 1956, this Decree is rendered in this cause, same having been submitted to the Court and taken under advisement upon briefs by counsel and the findings and opinion of the Court filed herein; said cause was set for trial November 29, 1954, and was regularly reached on the Court's docket on said date and came on to be heard, the plaintiffs appearing by their attorney, U. A. Gentry, the defendants, Garland Anthony, Edwin Anthony and Anthony-Jones Lumber Co. appearing by their attorneys, L. B. Smead and L. Weems Trussell; the defendants, Fay Furlow, James Abbott and Furlow-Abbott Company, a corporation, appearing by their attorney, J. R. Wilson, the defendants, Ruth Jones Roberts, Mollie Fred J. Pudephatte, Lizzie Lou J. Pudephatte, James D. Jones appearing by their attorney, Hendrix Rowell; the defendants, William R. Arendt and Eugene F. Calloway appearing by their attorney, L. B. Smead; the defendants, M. B. Garrison and E. H. Gill appearing by their attorney, W. C. Medley; the attorney-ad-litem's report filed for the non-resident defendant, Vivian S. Ligon; the report of the attorney-ad-litem in behalf of the non-resident cross-de-

fendants, E. W. Prothro and E. H. Coulter, Sr.; the answer of Louise J. Anthony filed herein; the cross-defendants, Murray W. Coulter, Stella P. Coulter, Guardian, and George Prothro Coulter, appearing by their attorney, U. A. Gentry; the cross-defendants, Furlow-Abbott Co., Inc., appearing by its attorney, J. R. Wilson; the cross-defendants, L. E. Hornaday, E. W. Prothro and E. H. Coulter, Sr., come not, but wholly make default; whereupon, this cause was presented to the Court upon the complaint and the amendments thereto, the exhibits to said pleadings, the answer and Cross Complaint of the defendant, Garland Anthony, individually, and Garland Anthony and Edwin Anthony, d/b/a Anthony Jones Lumber Co. and the amendments thereto and the exhibits thereto attached, the answer of plaintiffs to said cross complaint and amendments, the affidavit for warning order for constructive service upon the non-resident cross-defendants, E. W. Prothro and E. H. Coulter, Sr., the warning order and proof of publication thereof for the time and in the manner provided by law, the appointment of Frank W. Wynne as attorney ad litem, the report of the attorney-ad-litem filed herein in behalf of E. W. Prothro and E. H. Coulter, Sr., the answer of Furlow-Abbott, Inc., Fay Furlow and James Abbott, the answer of Ruth Jones Roberts, Mollie F. J. Pudephatte, Lizzie Lou Jones Pudephatte, and James D. Jones, the answer of William R. Arendt and Eugene F. Calloway, the answer and cross complaint of E. H. Gill and M. B. Garrison, and the reply of the plaintiffs thereto, the report of the attorney-ad-litem filed in behalf of Vivian S. Ligon, the report of the attorney-ad-litem filed in behalf of E. W. Prothro and E. H. Coulter, Sr.: the motion of defendants to require plaintiffs to elect remedy to redeem or to attack tax sale: the election of plaintiffs to attack the validity of the sale of lands for non-payment of taxes, and all other

pleadings filed in this cause and made a part of the record in this case, certified copies of deeds, excerpts from the tax records, the depositions of E. W. Prothro, and E. A. Biddle, the discovery deposition of E. H. Coulter, Sr., all of the papers on file in the office of the Chancery Clerk of Calhoun County in Chancery Case No. 760, a case wherein W. A. G. Woodward, Trustee, was plaintiff and John R. Harris, et al were defendants, the decree of confirmation of title made July 19, 1940, in Calhoun Chancery Case No. 1061, the deed from Vivian S. Ligon to the plaintiffs showing that she has no further interest in this cause of action, the deeds in the chain of title of the other defendants herein, and other documentary evidence together with the oral testimony of a number of witnesses for the plaintiff and for the defendants, which testimony was heard ore tenus at the bar of this court on November 29 and 30, 1954, and taken down in shorthand by Grover C. Snuggs who was appointed by the Court to report and transcribe the evidence taken orally in this cause, the brief and argument of counsel for the plaintiffs, the brief and argument of counsel for defendants, the motion of the defendants, Garland Anthony, et al for bond for costs, the order made thereon on October 10, 1955; the bond of plaintiffs for costs filed herein in conformity with Section 27-2302 Arkansas Statutes 1947; the motion of defendants, Garland Anthony, Edwin Anthony, M. B. Garrison and E. H. Gill, to re-open the case for further proof filed December 6, 1955, and the order entered February 13, 1956, re-opening this cause admitting in evidence the discovery deposition of E. H. Coulter, Sr., and the exhibits thereto and the exhibits to the deposition of Madoline Griffin referred to in the E. H. Coulter, Sr., deposition, from all of which and other matter, things and proof before the Court, the Court being well and sufficiently advised as to all matters of law and

fact arising herein, and the premises being fully seen, doth find:

That this Court has jurisdiction of this cause and the parties hereto. That the testimony of all parties has been fully completed; that the argument of counsel has been fully completed; that this court has full and complete jurisdiction for the rendition of the findings, judgment, order and decree at this time as hereinafter set out:

FINDINGS OF THE COURT

This suit is brought by Murray Whitfield Coulter, a minor, by Stella P. Coulter, his statutory guardian, and George Prothro Coulter to recover certain lands in Calhoun County on the ground that the tax sale under which the defendants claim title is void because of jurisdictional defects and irregularities in said sale.

The defendants filed their answer and cross complaint in which they allege that plaintiffs were not the real parties in interest and further that the real party in interest was E. H. Coulter, Sr. The plaintiffs claim title under a deed from E. W. Prothro, purported to have been executed August 28, 1933, and filed for record August 3, 1940. Prothro claims title under trustee's deed dated August 17, 1933, and filed for record on August 23, 1933, the lands in controversy being formerly owned by Harris Bros. of Thornton, Calhoun County, Arkansas, who had been thrown into bankruptcy, and he deed to Prothro was from the trustee, W. A. G. Woodward.

At the trial of this cause, plaintiff's attorney announced that this was not an action to redeem said lands from said tax sale by reason of the minority of the plaintiffs, and said cause was tried and the proof was made by plaintiffs' attacking the tax sale as being void.

The proof in this case shows that Anthony-Jones Lumber Company is a partnership composed of Garland Anthony and Edwin Anthony; that the defendants, Ruth Jones Roberts, Mollie Fred Jones Pudephatte, Lizzie Lou Jones Pudephatte, and James David Jones have no interest in any of the lands involved in this suit.

The Court has studied the evidence in this case closely, together with the excellent briefs furnished by all counsel, and has reached the conclusion that the complaint of the plaintiffs should be dismissed for want of equity, and title to said lands should be quieted in the defendants, and I will hereafter specifically outline the Court's reasons for making such findings:

CUSTODIA LEGIS

Plaintiffs contend that the said tax sale complained of was void because the sale was without the consent of the bankruptcy court and in their brief recited many decisions; the defendants also to uphold their contention cited many decisions; however, I do not think it is necessary to refer to these decisions further. The court feels that this contention is not well taken and that the doctrine of Custodia Legis is not applicable, because the Court has reached the conclusion that the sale of the assets of Harris Bros. to E. W. Prothro was made by the trustee with full knowledge of the delinquent taxes, and it was the intention of the Trustee to sell said real estate of the bankrupt subject to the delinquent taxes against the same at that time. (In the order approving the Trustee's Report of Sale, the Trustee was directed and ordered to convey to E. W. Prothro all the rights, title and interest of the Trustee for the estate of Harris Bros. in and to all the real estate but subject to delinquent taxes as adverse claims.) It is evi-

dent from that language that the bankruptcy court was informed of the certification of the land to the State for delinquent taxes and made no effort to interfere therein. It sold the real estate subject to the lien for delinquent taxes and passed that on to Prothro for him to handle. Along with the land in controversy in this lawsuit, Prothro purchased other property, the same being business property in the town of Hampton. Within a few days after acquiring his deed from the trustee he paid the taxes on the property at Hampton when his attorney, E. H. Coulter, completed the transaction by which the property was sold to E. C. Johnston for $2500.00, the said $2500.00 being the same amount that was paid for the entire assets of Harris Bros., bankrupt, a few days before that date.

In fact, the testimony showed that Prothro and E. H. Coulter, his attorney, knew when they paid $2500.00 for the entire assets that they could sell the store building in Hampton to E. C. Johnston for that amount. Mr. Johnston refused to pay any money for the property until all the delinquent taxes were paid. The proof shows that E. H. Coulter paid the taxes on the property in Hampton at the time he sold the property to Mr. Johnston and didn't raise any question about the delinquent taxes being void at that time, and as I previously stated, the court is convinced that the sale by W. A. G. Woodward, Trustee, to E. W. Prothro shows conclusively this sale was subject to the delinquent taxes due thereon and that the Trustee's equity was being sold, subject to said taxes due thereon.

(See Minutes of the Referee in Bankruptcy dated July 12, 1933, appearing at pages 79-A through 79-F of the depositions of E. H. Coulter. Also see statement of Mr. Rogers at page 79-C:

"There is a cloud on the title and there are a lot of

past due taxes, amounting to some thousand dollars that have got to be paid."

Also statement of Mr. Rogers on page 89-B:

"The lands will be sold subject to all that. I do not see any other way it could be handled except to sell whatever right or title the Trustee had."

The Court after studying this evidence closely is of the opinion that it was well understood between the Trustee in Bankruptcy and by the purchaser, E. W. Prothro, and by attorney Coulter that the sale of this property for $2,500.00 was made subject to the delinquent taxes. Therefore, I do not feel that the question now complained of by plaintiffs can be asserted in a court of equity.

The defendants filed their answer and cross complaint in which they alleged that the plaintiffs were not the real parties in interest, and on this particular point the Court has very carefully considered all the evidence and has reached the conclusion that these plaintiffs, Murray Whitfield Coulter and George Prothro Coulter are not the real parties in interest, but that E. H. Coulter, Sr., the father of the said minors, is the real party in interest, and has been throughout this entire transaction.

The record shows that E. H. Coulter, Sr., and Stella P. Coulter, the guardian, who are husband and wife, are the parents of the said minor Coulter plaintiffs, and that E. W. Prothro is a brother to Mrs. Stella P. Coulter.

I will first discuss the deed from E. W. Prothro to George Prothro Coulter and Murray Whitfield Coulter filed for record on the 3rd day of August, 1940, alleged to have been executed on August 28, 1933.

Plaintiffs claim title under deed which is alleged to

have been executed in 1933 and, according to the deposition of E. H. Coulter, father of the said minors, was delivered to Stella P. Coulter who brings this present suit in behalf of her son. Prothro, the record shows, is a brother of Mrs. Coulter and brother-in-law of E. H. Coulter, the attorney for the Trustee in Bankruptcy. The record shows that Prothro acquired his deed from the trustee August 17, 1933, and filed same for record August 23, 1933. The testimony on behalf of the plaintiffs was that Prothro deeded the land in controversy to the Coulter minors as a gift, said deed having been executed on August 28, 1933, which was not filed for record until August 3, 1940, almost seven years later.

(1) If this deed was executed in 1933 as alleged, this fact was concealed from the Chancery Court of Calhoun County in case No. 760. Complete file in case No. 760 was introduced in evidence in the trial of the present case, and the Court has studied the file completely, and although I do not recall this particular point having been discussed by the attorneys in their briefs the Court finds among the papers in case No. 760 a stipulation filed on April 7, 1936, which stipulation shows the plaintiff to be W. A. G. Woodward, Trustee and John R. Harris, et al., as defendants. This stipulation has attached to it a report of sale of the Trustee, a copy of the Order, and copy of the deed from W. A. G. Woodward, Trustee, to E. W. Prothro. The Deed to Prothro is dated August 17, 1933, and was promptly filed for record on August 23, 1933. This stipulation was filed more than two and one-half years after date of deed from Prothro to Coulter's children is alleged to have been executed, yet the father of the minors who was the attorney for plaintiffs concealed the execution of the deed, if any there was, from the Court and proceeded with case No. 760 as though E. W. Prothro was the real party in interest.

This was a suit to quiet and confirm to Harris Bros. land, and if Prothro had in fact executed this alleged deed, the attorney for plaintiff owed the Court the duty to prosecute the confirmation suit in the name of the real party in interest and should have attached to the stipulation a copy of the deed from Prothro to the Coulter children, and according to the testimony of Mr. Coulter himself he learned of the deed from Prothro to his minor children in a very few months after he testified it was executed and knew of it for at least two years before this suit in Calhoun County Chancery Court was tried.

(2) Further investigation of the paper in the Calhoun Chancery case No. 760 reflects that on May 24, 1937, a Motion was filed on behalf of John R. Harris, et al., to vacate the decree confirming title to the Harris Bros. land. On page 4 of this motion appears the following:

"This litigation in the Calhoun Chancery Court proceeded in the name of W. A. G. Woodward, Trustee, as Plaintiff. The stipulation above referred to would indicate that E. W. Prothro was the owner of the assets of Harris Bros. estate by reason of purchase. The facts developed are that Mr. Prothro was a Brother-in-law of E. H. Coulter, although it was ostensibly a transaction of Mr. Prothro's, the real beneficiary in the transaction was E. H. Coulter."

A hearing was held on the motion to set aside the decree, and on June 25, 1937, an order was entered sustaining the motion, which order states:

"And the Court after listening to the testimony, both oral and documentary, doth find that the motion is well taken and that said motion should be sustained, and the Judgment and decree of the Court set aside and held for naught."

If the deed from Prothro to the Coulter minors had been executed in 1933, certaining [certainly] E. H. Coulter had a duty in the year 1937 to disclose the fact when the question of "Who was the real party in interest" was made an issue in case No. 760. The Chancery Court found that the allegations of the Motion were well taken and found that E. H. Coulter was the real party in interest and that E. W. Prothro was only a straw man holding the record title for E. H. Coulter.

The Court after considering all of the testimony on this question cannot reach any other conclusion but that E. H. Coulter was the real party in interest. His actions in the Calhoun Chancery Case No. 760 I think is sufficient to convince this court that he was, but throughout this entire transaction we find him appearing in many roles. We find him appearing as attorney for the Trustee in Bankruptcy. In the discovery deposition of Mr. Coulter at page 79-A and 79-G, E. H. Coulter is shown as appearing for the Trustee ;at page 79-B, Mr. Coulter advises the Trustee in regard to the sale as follows:

"We think it would be for the benefit of the estate."

At page 40, Mr. Coulter advises Johnston Bros. who purchased the business property in Hampton by letter dated August 17, 1933, as follows:

(Last three lines of letter)

"And I made the above mentioned statement to you for the reason that I desired to see the trustee receive the best price possible for the property."

The deed to Johnston Bros., Inc., introduced at the trial shows it was executed August 17, 1933, by E. W. Prothro; the deeds to Prothro were not delivered by the

trustee until August 23, 1933. (See pages 31-34-35 deposition.)

I think the testimony of Mr. Coulter himself reflects he was not only the attorney for the trustee but he was attorney for the purported purchaser, E. W. Prothro, his brother-in-law. At page 35, E. H. Coulter testified, "There was a deal between me and Johnston Bros., between me acting as counsel for Dr. Prothro, and Johnston Bros. that they would purchase that property." Later in the deposition (page 37) E. H. Coulter testified that he signed the Johnston Bond himself and signed everything necessary to complete the sale of the building in Hampton to Johnston Bros. in the absence of Dr. E. W. Prothro. At page 36 in the deposition of E. H. Coulter he was asked:

Q. And how much did *you* get from the Johnston Bros.?

A. $2500.

Q. How much did you pay for the entire transaction?

A. $2500.

Q. So that afternoon when you came back you had your money back, a thousand acres of land, and two lawsuits, did you?

A. That is correct.

So from the testimony of Mr. Coulter himself we have him representing the vendor, who was the Trustee in Bankruptcy, the purchaser, E. W. Prothro, his brother-in-law, and his minor children, Murray Whitfield Coulter and George Prothro Coulter. At the bottom of page 28, E. H. Coulter testified he thought he was representing Dr. Prothro in 1933, but that it turned out he was representing "my two minor children". And from all of the evidence

the Court cannot reach any other conclusion but that E. H. Coulter is at this time the real party in interest and has been from the very beginning of the transaction in 1933, and although the record shows that he acted in many roles in the sale, purchase and acquisition of the Harris Bros. assets, it is apparent from the record in this case, and the Court is entirely convinced that E. W. Prothro is a straw man and that the minors are a "subterfuge," and that E. H. Coulter was representing himself in the entire transaction, and using the inside information which he obtained in his official capacity as attorney for the Trustee to acquire the assets without cost to himself. Prothro may have had some part in the transaction other than lending his brother-in-law the use of his name, but the deeds attached as exhibits to the deposition appear to have been admittedly executed by Coulter; the indemnity bond appearing at page 39 was executed by Coulter; the McGugan notes appearing at pages 46-47 of the deposition appear to have been negotiated by E. H. Coulter. There can be no doubt in the Court's mind but what E. H. Coulter himself was the real party in interest.

IT IS THEREFORE THE FINDINGS OF THE COURT That E. H. Coulter is the real party in interest. Because of his being the real party in interest, the Court does not feel that it is necessary to elaborate on the question of any irregularities in the tax sale, but that the complaint of the plaintiffs should be dismissed for want of equity and tile to said lands quieted in the defendants as prayed for in their answer and cross complaint. As the Court has already stated, it is the Court's opinion that E. H. Coulter is the real party in interest, and the Court is further of the opinion that he could not acquire title to the assets of Harris Bros. Bankrupt for himself or those in privity with him because of his relationship as attorney

for the trustee in bankruptcy. There are numerous cases cited in the Arkansas Reports on this subject, one of the most recent being the case of Collins v. Heitman (Vol. 100 No. 3 Law Reporter 69 and at page 75) wherein the Supreme Court of Arkansas on December 12, 1935, said:

"Everyone, whether designated agent, trustee, servant, or what not, who is under contract or other legal obligation to represent or act for another in any particular business, or for any valuable purpose, must be loyal and faithful to the interest of such other in respect to such interest or purpose. He cannot lawfully serve or acquire any private interest of his own in opposition to it. This is a rule of common-sense and honesty, as well as law. The agent is not entitled to avail himself of any advantage that his position may give him to profit beyond the agreed compensation for his services. He may not speculate for his gain in the subject-matter of the employment. He may not use any information that he may have acquired by reason of his employment, either for the purpose of acquiring property or doing any other act which is in opposition to his principal's interest."

The above quotation is taken from the recent case of Mchaney v. Mchaney, 209 Ark. 337; 190 SW 2nd 450; 162 A. L. R. 1175. See also Walthour v. Pratt, 173 Ark. 617; 292 SW 1020; 21 R. C. L. 825.

In the present case, proof of R. H. Peace and E. C. Johnston shows that E. H. Coulter used the information relative to the price which Johnston Bros. was willing to pay for one parcel of the real estate at Hampton to obtain the funds with which to fraudulently acquire all of the Harris Bros. assets, both real and personal, and that no actual consideration passed to the Trustee in Bankruptcy

from E. W. Prothro, the nominal purchaser; that the Coulter minors could never acquire any valid title through this transaction which they could assert in a court of equity (see McClure v. McClure, 220 Ark. 312; 247 SW 2nd 466, Stuckey v. Locard, 87 Ark. 230-240; 112 SW 747.)

Counsel may prepare a decree to conform with this finding, and it be filed by the Court.

This 19th day of April, 1956.

R. W. LAUNIUS, CHANCELLOR

EXHIBIT A-2

DECREE, CALHOUN CHANCERY COURT

(See note to Exhibit A-1)

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED:

(1) That the complaint of the plaintiffs and the amendments thereto be and the same are hereby dismissed for want of equity.

(2) That the prayer of the cross complaints of the defendants be and the same are hereby granted as against the cross-defendants, Murray Whitfield Coulter, a minor, Stella Prothro Coulter, Guardian, George Prothro Coulter, E. W. Prothro, E. H. Coulter, Sr., and all other parties to this action;

(A) That title to the SE¼ NE¼, Sec. 31, Twp. 11 S., R. 13 W. (40 acres) be and the same is hereby quieted and confirmed in Garland Anthony.

(B) That title to the E½ NE¼, Sec. 8, Twp. 12 S., R. 13 W., (80 acres); the S½ NW¼, Sec. 9, Twp. 12 S., R. 13 W. (80 acres); the N½ SW¼ Sec. 9, Twp. 12 S., R. 13 W. (80 acres); the NE¼ SW¼ and a part of the W½ Frl. SW¼, Sec. 31, Twp. 11 S., R. 13 West, described as follows: Beginning at the northwest corner of said Frl. SW¼ run South 31.22 chains, thence East 9.37 chains, thence North 31.22 chains to the North line thereof, thence West on said North line 9.37 chains to the point of beginning, (containing 68.10 acres) be and the same is hereby quieted and confirmed in Garland Anthony and Edwin Athony, d/b/a Anthony-Jones Lumber Company, a partnership.

(C) That title to the NW¼ NW¼, Sec. 6, Twp. 12 S., R. 14 W. (40 acres) be and the same is hereby quieted and confirmed in E. H. Gill and M. B. Garrison.

(3) That the plaintiffs and those in privity with the plaintiffs have failed to establish title to the lands involved in this action; that it is equitable that the plaintiffs and the surety on their cost bond should pay all costs of this action, and judgment is hereby rendered against the plaintiffs, Murray Whitfield Coulter, a minor, who sues by Stella P. Coulter, Guardian, George Prothro Coulter and the Massachusetts Bonding & Insurance Company for all costs in and about this cause laid out and expended.

R. W. LAUNIUS, CHANCELLOR

Filed this 16th day of May, 1956.

R. L. Goodwin, Clerk

EXHIBIT A-3

OPINION ARKANSAS SUPREME COURT delivered November 4, 1957 (formal caption omitted):

"GEORGE ROSE SMITH, J. This is a suit by the two appellants, Murray Whitfield Coulter and George Prothro Coulter, to cancel the appellees' tax titles to several hundred acres of unimproved land in Calhoun County. The chancellor, without reaching the question of whether the tax titles are valid, held that the appellants are not the real parties in interest and dismissed the complaint for that reason.

"The plaintiffs assert that the lands were formerly owned by Harris Brothers, a partnership which was adjudicated a bankrupt on January 23, 1932. On June 13 of that year, while the bankruptcy proceedings were still pending, the land was sold to the state for nonpayment of the 1931 taxes. The state's title was subsequently acquired by the appellees and is the basis for their claim of ownership.

"The appellants derive their asserted title from the Harris Brothers bankruptcy proceedings. On August 16, 1932, the trustee in bankruptcy was authorized to sell the land to E. W. Prothro, by private sale, and the trustee's deed to Prothro was executed on the following day. The trustee's attorney in the bankruptcy proceedings was the appellants' father, E. H. Coulter. It is contended by the appellees that the elder Coulter was the real purchaser at the bankruptcy sale and that the deed to his brother-in-law, Prothro, was a subterfuge. Eleven days after the sale Prothro conveyed the land to his two nephews, the appellants, who were then one and three years old respectively. When the present suit was brought one of the plaintiffs was twenty-one and the other nineteen.

"It is conceded by the appellants that they have no statutory right to redeem the land from the tax sale, for the period of redemption had already begun to run when they acquired their title and was not extended by reason of their minority. *Tarrence* v. *Berg*, 202 Ark. 452, 150 S. W. 2d 753. If the appellants are to prevail they must show that the 1932 tax sale was void. Since this issue controls almost the whole case we consider it first.

"Four defects are relied upon by the appellants to support their assertion that the tax sale was void. First, we are urged to declare the sale void because it was conducted without the consent of the bankruptcy court. Representative authorities cited by the appellants on this point include *Dayton* v. *Stanard*, 241 U. S. 588, *In re Eppstein*, 8th Cir., 156 Fed. 42, and Remington on Bankruptcy (5th Ed.), Par. 2539.

"We do not conceive the rule to be as far-reaching as the appellants would have it. Doubtless the bankruptcy court could have set aside the tax sale had it chosen to do so, but this merely demonstrates that the sale was voidable, not that it was void. There was no federal statute prohibiting the sale or requiring the tax collector to obtain permission to sell the property. The principle is instead a rule of judicial decision and is derived from the power of the court to protect property in its custody. It seems clear that some affirmative action on the court's part is needed if the sale is to be avoided. In the *Dayton* case the bankruptcy court took that action by the entry of an order canceling the certificates of purchase and requiring the purchasers to assert claims against the assets of the bankrupt. A somewhat similar course was followed in the *Eppstein* case. We are not aware of any decision holding that the mere failure of the taxing authorities to obtain permission

for the sale renders the tax forfeiture absolutely void and open to collateral attack.

"In the Harris Brothers matter the bankruptcy court made no effort to set aside the collector's sale. To the contrary, the order authorizing the trustee's sale to Prothro expressly made it subject to the delinquent taxes against the land. It is quite apparent that the tax sale did not interfere in any way with the bankruptcy court's control of the property. It would be carrying the rule beyond its reason to say that the absence of prior judicial consent rendered this sale void.

"Second, the certificate showing the publication of the notice of sale was not executed by the county clerk until the day of sale, when it should have been executed that day. In the absence of a curative act this defect renders the sale void. *Cecil* v. *Tisher*, 206 Ark. 962, 178 S. W. 2d 655. One of the tracts involved, being part of the fractional southwest quarter of Section 31, township 11 south, range 13 west, was sold by the state after the repeal of Act 142 of 1935 and is not subject to the operation of any curative act. As to this tract the appellants are correct in their contention that the tax sale was void.

"All the rest of the land was conveyed by the state during the two years that Act 142 of 1935 was in force, and hence the appellees are entitled to the curative benefits of that act. *Wood* v. *Lovett*, 313 U. S. 362. As to these tracts the question is whether the clerk's belated execution of the certificate was an irregularity cured by Act 142 or a jurisdictional matter lying beyond the remedial power of the legislature.

"Our prior decisions indicate pretty clearly that t e defect was a mere irregularity. Act 142 was first construed

in the leading case of *Carle* v. *Gehl*, 193 Ark. 1061, 104 S. W. 2d 445. There we held that various matters such as the publication of the notice of sale are jurisdictional essentials, that the clerk's records are the only legal sources of information about these matters, and that consequently a complete failure to make the required record is a jurisdictional defect not cured by Act 142. But with respect to the officer's mere failure to act at the right time, as opposed to his total omission to act, we said: 'Beyond question it is within the power of the Legislature to provide for the rules by which the foregoing exercise of power may be made *both as to time and form*, and, having the power in the first place to make such rules, indubitably the Legislature has the power to alter or dispense with the same.' (Italics supplied.)

"The exact point now presented was decided in *Wallace* v. *Todd*, 195 Ark. 134, 111 S. W. 2d, 472, and, in harmony with the reasoning in the *Carle* opinion, it was held that the clerk's failure to make the certificate before the day of sale is an irregularity cured by Act 142. A contrary view was expressed, in a paragraph unnecessary to the decision, in *Union Bk. & Tr. Co.* v. *Horne*, 195 Ark. 481, 113 S. W. 2d 1091, but we regard the *Carle* and *Wallace* cases as sound and adhere to them.

"The appellants' third ground for attacking the sale presents a point of first impression. The assessment book shows that in three instances the county assessor listed and valued two contiguous forty-acre tracts, under the same ownership, as separate parcels. In each instance the county clerk, in making up the tax book, combined the two forty-acre tracts into one call of eighty acres (such as the E½ NE¼ instead of the NE¼ NE¼ and the SE¼ NE¼) and extended the taxes against the total assessed value of

the eighty acres. In the subsequent proceedings, including the collector's sale, the eighty-acre descriptions were used.

"In insisting that this asserted defect is fatal to the sale the appellants rely on a line of cases beginning with *Cocks* v. *Simmons*, 55 Ark. 104, 17 S. W. 594, 29 A. S. R. 28. These cases hold that two or more tracts cannot be sold in a body for the sum of the taxes due upon all. It is clear from the opinions, however, that the taxes were separately extended against the various tracts, and it was the collector who lumped them together in making the sale. We have no precedent involving the present situation, where tracts separately assessed were consolidated on the tax book for the extension of the taxes.

"In the peculiar circumstances of this case we cannot say that the Clerk's procedure, if it was erroneous at all, was more than an irregularity cured by Act 142. The statute governing the preparation of the tax book does not contain detailed directions for describing the property; it merely states that each separate tract shall be listed opposite the name of the owner. Ark. Stats. 1947, P. 84-801. In this case each pair of forty-acre tracts was assessed in the name of the same owner; so in consolidating the contiguous parcels into one tract the clerk cannot be said to have deviated from the letter of the statute governing the preparation of the tax book.

"It might be argued, however, that the clerk should have followed the more detailed directions contained in the statute applicable to the assessment book. But even in this view the clerk's procedure was not demonstrably wrong. The assessment book is made up before the first of January of the year in which the property is to be assessed. Ark. Stats., S. 84-402. When the assessment book now in question was prepared the controlling statute was Act 172 of

1929, which provided that not more than forty acres should be entered under one call. That statute was evidently followed in the present instance. But the tax book cannot be prepared until the clerk receives the assessment book from the assessor on or before the third Monday in August. Ark. Stats., 84-447. When the tax book now in issue was prepared in the latter part of 1931 the statute having to do with the assessment book had been changed by Act 72 of 1931, which eliminates the forty acres maximum for each tract and provides that the subdivisions of each section, up to a whole section, are to be listed as they belong to different individuals. Ark. Stats. 84-402. Again it does not appear that the clerk's procedure was contrary to the statute.

"In holding that this irregularity, if it amounted to that, was not fatal to the sale, we stress the fact that it could not have had any substantial adverse effect upon the rights of the taxpayer. An eighty-acre governmental subdivision can equally well be described as two forties, four twenties, eight tens, and so forth. The total taxes come to the same amount, no matter how the land is subdivided. In this instance the consolidation was actually favorable to the taxpayer, for the costs resulting from the delinquence were eighty cents less than they would have been had the two forties been taxed and sold separately. In these circumstances we think it plain that the variation between the assessment book and the tax book was at most an irregularity falling within the purview of Act 142.

"As to a fourth ground for attacking the sale the appellants assert that some of the tracts were sold for an excessive amount. The excess, however, was less than a cent and does not invalidate the sale. *Cowling* v. *Muldrow*,

71 Ark. 488, 76 S. W. 424; *Kinney* v. *Duggan*, 199 Ark. 396, 133 S. W. 2d 878.

We conclude that the appellants have failed to establish the invalidity of the tax sale except with respect to the one tract not affected by Act 142 of 1935. As to this tract it is necessary to consider the other grounds advanced by the appellees for affirmance of the decree.

"It is first contended that the appellants are not the real parties in interest. Here the theory is that E. H. Coulter was disqualified as a purchaser at the bankruptcy sale, owing to his being the attorney for the trustee, but that he nevertheless purchased the property and had it conveyed through Prothro to his children. Except for inferences to be drawn from the fact that the conveyances were between parties related to one another there is little or no competent proof that Coulter actually furnished the purchase money. In our opinion, however, the appellees' position would not be sound even if sustained by proof; so the evidence need not be weighed.

"In the first place, the appellees are not entitled to complain of fraud in a transaction to which they are strangers. If Coulter violated a fiduciary duty by purchasing at the bankruptcy sale, the wrong was to the bankrupt partnership and its creditors. They might have enforced a constructive trust upon the property and would then have been required to refund the purchase money paid by Coulter, *Pharr* v. *Fink*, 151 Ark. 305, 237 S. W. 728, Restitution, S. 192, *i*. But the injured persons have not elected to complain, and the appellees are not in a position to do so. They merely hold a void tax title and come within the rule that in a suit to quiet title a defendant who has no title is not permitted to show that the plaintiff's own deed was obtained from a third person by fraud. *Fuller*

v. *Fuller*, 228 Mass. 441, 117 N. E. 838; *Obermeyer* v. *Behn*, 108 N. Y. S. 289, affd. 195 N. Y. 588, 89 N. E. 1106.

"Furthermore, the appellants are in fact the real parties in interest. It is clear that E. H. Coulter, having no title to the property, could not maintain the present suit, nor could he assert his own fraud as a basis for recovering the land from his sons. *McClure* v. *McClure*, 220 Ark. 312, 247 S. W. 2d 466. If Coulter was guilty of wrongdoing his own conduct has placed the property irretrievably beyond his reach. This leaves the appellants, who of course were too young to have participated in the asserted misconduct, as the sole holders of the legal title. In New York, whose civil code is the prototype of our own, it is settled that the plaintiff is the real party in interest if he has the legal title and if a recovery or satisfaction by him would protect the defendant against all claims by third persons. *Sheridan* v. *Mayor*, 68 N. Y. 30; *Borgos* v. *Price*, 140 Misc. Rep. 287, 250 N. Y. S. 457. Both conditions of the rule are satisfied in this case.

"The appellees also plead the statute of limitations as a defense to the suit. The land is unimproved, and the appellees rely upon the payment of taxes for more than seven years under color of title. Ark. Stats., 37-102. That statute is not in itself a statute of limitations. It merely creates constructive possession, and it is necessary to apply the general statute of limitations for that possession to ripen into title. *Hubble* v. *Grimes*, 211 Ark. 49, 199 S. W. 2d 313. The general statute contains a saving clause in favor of persons who were minors when the cause of action first accrued. Ark. Stats. 37-101. The appellees' constructive possession did not begin until after their purchase from the state in 1937, and since the appellants then owned the land they were entitled to bring the suit within three years

after reaching their majority. The complaint was well filed within the time allowed.

"Finally, it is contended that the plaintiffs failed to deraign their title to the land, or to prove their ownership in some other manner, and are therefore not entitled to a decree under the holding in *Coulter* v. *O'Kelly*, 226 Ark. 836, 295 S. W. 2d 753. The decree in this case was rendered before our decision was announced in the *O'Kelly* case, and for the reasons stated in *Griffin* v. *Isgrig*, ____ Ark. ____, 302 S. W. 2d 777, the appellants will be permitted to offer proof of their title on remand.

"Affirmed in part and reversed in part."

EXHIBIT A-4

PETITION FOR REHEARING filed November 20, 1957 (formal caption, verification and proof of service omitted):

"Appellants Murray Whitfield Coulter and George Prothro Coulter pray that the judgment rendered herein be set aside and that they be granted a new hearing, and for cause state:

"— 1 —

"The finding, holding and conclusion of the Court to the effect that the sale of the properties involved herein by the taxing authorities, without permission of the bankruptcy court, and at a time when the property was in *custodia legis* and under the exclusive jurisdiction of that Court, was not void, was erroneous for the following reasons:

"(a) The Court erroneously assumed (and proceeded on that assumption) that the question under consideration was not controlled by federal legislation;

"(b) The Court erroneously found, concluded and held that the sale of which appellants complain was not contrary to the law as announced in the Federal Court decisions; and

"(c) The Court erroneously found, concluded and held that Act 142 of the Acts of 1935 cured the defects in the sale complained of by appellants for the reason that such finding, conclusion and holding, as applied to the facts of this case, deprive appellants of their property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

"—2—

"The Court erred in holding that the failure of the Clerk to record the certificate showing the publication of the notice of sale before the day of sale was a mere irregularity cured by Act 142 of the Acts of 1935. The failure of the Clerk to make the certificate showing the publication of the notice of sale before the day of sale was a jurisdictional defect, previously so held by this Court, and in which decisions the appellants have a vested right, and to now hold that such defect was a mere irregularity cured by Act 142 of the Acts of 1935 constitutes a denial of appellants' constitutional rights and is a taking of their property without due process of law, in violation of Amendment number 14 of the Constitution of the United States.

"—3—

"The Court erred in holding that the action of the County Clerk combining two forty-acre tracts into one call

(affecting 240 acres of land) and extending the tax against the entire tract for an amount determined by adding the assessed valuation of the separate forty-acre tracts, and the sale thereof by the collector for the sum total extended against the entire tract, was a mere irregularity. The holding of the Court results in the taking of appellants' property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States in that the property was thereby sold for the taxes due upon each of the other forties, as much as for the taxes due upon one separate forty, which amounted to a sale of property for taxes not assessed thereon, upon which no lien existed, and for which the property was not liable for the tax.

"—4—

"The Court erred in holding that the lands involved were not sold for an excessive amount and in further holding that such excess, if any, was less than one cent, which did not invalidate the sale. The sale of one forty-acres of land for the tax due on another constituted an excess tax, and in one particular instance, i. e., the sale of the Northwest Quarter of the Northwest Quarter (NW¼ NW¼) of Section 6, Township 12 South, Range 14 West, the record discloses that the sale was for an excess of one cent over and above the legal amount of taxes, penalty and costs. This rendered the sale of this particular forty-acre tract void for the lack of power to sell.

"WHEREFORE, appellants pray that the judgment entered herein be set aside and that a petition for rehearing be granted, and upon a rehearing, that the cause of action be reversed, with directions to enter a judgment setting aside the tax sale; and for all other general and equitable relief to which they may be entitled."

EXHIBIT A-5

OPINION OF ARKANSAS SUPREME COURT ON PETITION FOR REHEARING delivered January 20, 1958 (formal caption omitted):

"GEORGE ROSE SMITH, J. In a petition for rehearing the appellants contend that with respect to one forty-acre tract the tax sale was for an amount that was excessive by more than a cent. The taxes upon this tract came to $4.3722, which the clerk rounded off as $4.38. When the taxes were not paid the 10% penalty was entered in even figures as 44c, making a combined tax and penalty of $4.82. It is now insisted that this charge was fatally excessive, because a tax of $4.3722 plus a penalty of $.43722 would be only $4.80942.

"This argument is not sound. The computation of the tax and the computation of the penalty took place several months apart. Under the cases cited in the original opinion it was permissible in each instance for the clerk to round off the fractional amount in even cents, since the difference was less than the smallest coin in our monetary system. Two rights do not make a wrong. It would be manifestly impractical to require the clerk, before entering the penalty in round figures, to recompute the original tax to be certain that the two trivial fractional amounts did not together exceed a penny.

"Rehearing denied."

EXHIBIT A-6

DECREE, SUPREME COURT OF ARKANSAS, entered January 20, 1958, in lieu of and substitution for, a decree of November 4, 1957 (formal caption omitted):

"On this day, appellees' motion to retax the costs coming on to be heard, the Court finds that the motion should be granted and the costs divided equally. Thereupon, the judgment heretofore entered in this cause on November 4, 1957, is set aside and re-entered as of this date to conform to the order entered this date. Whereupon,

"This cause came on to be heard upon the transcript of the record of the chancery court of Calhoun County, and was argued by solicitors, on consideration whereof it is the opinion of the Court that there is error in so much of the decree of said chancery court as holds that the appellants are not the real parties in interest, and in dismissing their complaint; and also in holding the sale valid as to the Fractional Southwest Quarter of Sec. 31, Tp. 11 S., R. 13 W., since the sale of this particular tract of land was made after the repeal of curative Act 142 of 1935.

"It is therefore ordered and decreed by the Court that so much of said decree be, and the same is hereby, for the errors aforesaid, reversed, annulled and set aside, and that this cause be remanded to said chancery court for further proceedings to be therein had according to the principles of equity, and not inconsistent with the opinion herein delivered.

"But it is further the opinion of the Court that there is no further error in the decree of said chancery court, and the remainder thereof should be, and it is hereby affirmed.

"It is further ordered and decreed that the costs in this Court be paid one-half by appellants and one-half by appellees."

EXHIBIT A-7

STATEMENT, FINDINGS OF FACT AND CONCLUSIONS OF LAW filed in the United States District Court for the Western District of Arkansas, on August 5, 1946, in Civil Action 244, United States of America v. 68,000 Acres of Land (formal caption omitted):

"In re:

"Tract E-12-2, SW1/4 of NE1/4 Sec. 12, Twp. 12 South, Range 14 West; Tract E-3-3, W1/2 SW1/4 SE1/4 and SE1/4 of SW1/4 of Section 12, Twp. 12 South, Range 14 West, all in Calhoun County, Arkansas.

"STATEMENT

"The above designated tracts of land were duly condemned and title vested in the United States of America. The value of tract E-3-3 was fixed at $775.00 and tract E-12-2 at $700.00 on April 24, 1946. The determination of the ownership of each tract and distribution of the funds were reserved at that time and the matter is now before the court.

"George Prothro Coulter and Murray Whitfield Coulter, minors, by their guardian Mrs. Stella P. Coulter are claiming the funds now in the registry of the court for both tracts.

"Furlow-Abbott Company, Inc., is claiming the funds for tract E-12-2.

"B. M. Ritchie is claiming the funds for Tract E-3-3.

"Mrs. C. C. Harris, surviving widow and Bill Bert Harris, Bernice Estella Harris, Mary Ann Harris and Martha Sue Harris Head, children of C. C. Harris, deceased, are claiming both tracts.

"The pertinent and material facts are reflected by the pleadings and exhibits thereto and the stipulation filed by the claimants. The issues and the contentions of the various claimants have been extensively briefed and argued by their respective attorneys.

"The court after full consideration of the record before it and the briefs of the respective attorneys, now makes and files herein its formal findings of fact and conclusions of law, separately stated.

"FINDINGS OF FACT

"1. The claimants are all seeking to recover the funds in the registry of the court, which stand in lieu of the land condemned.

"2. On January 23, 1932, the land was owned by Harris Brothers, a partnership consisting at that time of W. L. Harris, Jno. R. Harris, and C. C. Harris, on which date the partnership was adjudicated a bankrupt and E. T. Hays was named trustee.

"3. The claimants, George Prothro Coulter and Murray Whitfield Coulter are each under the age of 18 years.

"4. The taxes duly assessed on the lands for 1931 were not paid and the same became delinquent April 10,

1932 and on June 10, 1932 were sold to the State of Arkansas by the Collector of Taxes for Calhoun County, Arkansas. Said sale was made without the consent of the Bankruptcy Court. The certificate of the County Clerk certifying to the publication of the notice of the sale was made on the day of the sale and not before the day of the sale.

"5. On July 12, 1933, W. A. G. Woodward, trustee in succession in bankruptcy, sold upon order of Referee in Bankruptcy at private sale the land to E. W. Prothro, subject to all delinquent taxes. The sale was reported by the trustee and was confirmed by the referee on August 16, 1933.

"6. On August 28, 1933, E. W. Prothro conveyed the land to the Coulter minors by deed, which was not recorded until August 3, 1940.

"7. On November 25, 1935, the State Land Commissioner conveyed tract E-12-2 to Fay Furlow and on April 13, 1940 Fay Furlow conveyed the tract to the claimant, Furlow-Abbott Company, Inc. The taxes on the tract were paid by these grantees for the years 1936 to 1944, both inclusive, and Fay Furlow paid the State of Arkansas the sum of $40.00 at the time he acquired the deed from the State Land Commissioner.

"8. On March 25, 1941 for a consideration of $97.00 paid by B. M. Ritchie, the State Land Commissioner conveyed tract E-3-3 to the claimant, B. M. Ritchie, who has paid the taxes on the tract for the years 1941 to 1944, both inclusive.

"9. Both tracts are wild and unimproved and have not been in the actual possession of anyone for seven consecutive years since January 23, 1932.

"10. C. C. Harris, a member of the partnership of Harris Brothers, was insane at the time of the adjudication of bankruptcy and he appeared therein by guardian. He also appeared by guardian and attorney, J. R. Wilson, at the hearing on July 12, 1933, when the order for the sale of the land was made. He also filed a petition by his guardian, N. N. Wood, and his attorney, J. R. Wilson, on May 23, 1933, seeking to have himself declared the owner of an undivided one-half interest in these and other lands, but it does not appear that any formal order was entered on the petition other than the order of sale entered by the referee.

"CONCLUSIONS OF LAW

"1. The court has jurisdiction of the parties and the subject matter, since it acquired possession of the funds in the course of a condemnation proceeding within its jurisdiction. Lola Castlio Oliver, et als. v. United States of America, et al., 8 Cir. ____ F. 2. ____. Ms. opinion delivered June 24, 1946.

"2. The Coulter minors are not entitled to redeem under Sec. 13860 of Pope's Digest of the Statutes of Arkansas. They were not the owners of the land at the time of the original sale for taxes, June 10, 1932, and the statute of limitations began to run while the title under which they claim was vested in an adult, E. W. Prothro. Sec. 13860 Pope's Digest; Benver v. Bean, 52 Ark. 132; Bradbury v. Johnson, 104 Ark. 108; Bowen v. Black, 170 Ark. 237.

"3. The title to the land, being vested in the trustee in bankruptcy at the time of the sale, the law of the United States pertaining to the disposition of property in *custodia legis* is supreme and state law, as well as state procedure, for the collection of taxes, must give way to the commands

of the greater sovereign. In re: Chicago Rapid Transit Company, 7 Cir. 129 F. 2d 1-4.

"4. The sale of the land for taxes on June 10, 1932, being made without the consent of the bankruptcy court, was absolutely void. Remington on Bankruptcy, 4th Ed. Sec. 2364 and cases there cited. Wiswall v. Sampson (1852) 14 How. 52, 66; In re: Tyler, Petitioner, 149 U. S. 164; Virginia T. & C. Steel & Iron Co. v. Bristol Land Co., 88 Fed. 134; In re: Eppstein, 8 Cir. 156 Fed. 42; Dayton v. Stanard, 241 U. S. 588. No right was lost or gained by anyone by reason of the sale. No title passed to the State and the title of trustee in bankruptcy was affected in no way.

"5. The sale by the trustee in bankruptcy and deed executed in pursuance thereto conveyed all the title of Harris Brothers, the partnership, to E. W. Prothro, and with the confirmation of the sale, all rights of all parties to the bankruptcy proceeding in and to the property were extinguished. Sec. 110, Title 11 U.S.C.A., and annotations of cases thereunder. See also Sec. 23, Title 11 U.S.C.A. The conveyance by the trustee passed all title that was owned by the partnership, although the land was still subject to the State's lien for taxes, but no valid proceedings had been instituted to foreclose the lien.

"6. The payment of taxes by Furlow-Abbott Company, Inc., and its grantor, on the land for more than seven years did not defeat the claim of the Coulter minors, who were the owners of the land at the time the corporation's grantor began paying taxes. Sec. 8920 of Pope's Digest of the Statutes of Arkansas must be construed in connection with the savings clause in Sec. 8918 for the benefit of the minors. Taylor v. Leonard, 94 Ark. 122-127; Nixon v. Norton-Wheeler Stave Co., 207 Ark. 838-840. Thus the

title to the land, subject to the lien for taxes, was in the Coulter minors at the time the same was condemned by the United States. This is likewise true as to the tract claimed by B. M. Ritchie.

"7. Neither Furlow-Abbott Company, Inc., nor B. M. Ritchie were *bona fide* purchasers for value and without notice of the claims of the Coulter minors, notwithstanding their deed was not placed of record until August 3, 1940. Bradbury v. Johnson, 104 Ark. 108-112.

"8. The widow and heirs of C. C. Harris, the insane member of the partnership, or in the alternative, the creditors of the bankrupt, have no claim upon the funds derived from the land. C. C. Harris was represented at every stage of the proceedings by his legal guardian and both were represented by J. R. Wilson, the same attorney who now appears for the widow and heirs. The creditors were represented by their attorney, Silas W. Rogers. That was in 1933 and at this late date the court would not be justified in setting the sale by the trustee aside. Moore's Federal Practice, page 3266-3270. There are no allegations that any of the parties were prevented by fraud, accident, or mistake unmixed with negligence on their part from presenting any defense that they might have had to the application for an order of sale. Wheiles v. Aetna Life Ins. Co., 5 Cir. 68 F. 2d 99. In the case of Wayne Gas Co. v. Queens Co., 300 U. S. 131-137, the court said:

> " '- - - - The rule which governs is that the bankruptcy court, in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case upon the merits.'

"It can hardly be said that the application on the part of the widow and heirs of C. C. Harris, now deceased, or

on the part of the creditors has been diligently made or that there are no intervening rights.

"9. The guardian of the Coulter minors is entitled to the funds arising from each tract, after the payment to Furlow-Abbott Company, Inc., of the sum of $40.00, plus the taxes paid by it and its grantor on tract E-12-2, and the payment to B. M. Ritchie of the sum of $97.00, plus the taxes paid by him on tract E-3-3. All such sums to draw interest at the rate of 6% per annum from date they were paid by the respective parties. The dates and amounts of the payments should be obtained by the interested parties from the stipulation on file herein. Judgment for the distribution of the funds will be entered as herein directed.

"The court has followed Dayton v. Stanard, 241 U. S. 588 in fixing the interest at 6% because of the sale of the property by the tax collector when it was [said] in the custody and control of the bankruptcy court.

"The exceptions of Furlow-Abbott Co., Inc., B. M. Ritchie and the widow and heirs of C. C. Harris will be noted in the decree of distribution.

"This August 5, 1946.

"/S/ JNO. E. MILLER
"United States District Judge."

APPENDIX B

STATUTORY AND CONSTITUTIONAL PROVISIONS

APPENDIX B — STATUTES

EXHIBIT B-1

The Act of January 4, 1851, a statute of limitations on actions to recover lands, contained, and contains, this saving clause, now a part of Section 37-101, Arkansas Statutes (1947), Annotated:

"Provided, if any person or persons that are or shall be entitled to commence and prosecute such suit or action in law or equity be or shall be at the time said right or title first accrued come or fall within the age of twenty-one [21] years or non compos mentis, that such person or persons, his, her or their heirs, shall and may, notwithstanding said seven [7] years may have expired, bring his or her suit or action, so as such infant or non compos mentis, his, her or their heirs, shall bring same within three [3] years next after full age, or coming of sound mind."

EXHIBIT B-2

The Act of December 14, 1844, now incorporated in the Arkansas Statutes as Section 37-226, contained this general saving provision:

"If any person entitled to bring any action, under any law of this State, be, at the time of the accrual of the cause of action, under twenty-one [21] years of age, or insane or imprisoned beyond the limits of the State, such person shall be at liberty to bring such action within three [3] years next after full age, or such disability may be removed."

APPENDIX B

STATUTORY AND CONSTITUTIONAL PROVISIONS

EXHIBIT B-3

Sections 151-153, Act 114 of March 31, 1883, now incorporated, in part, in Section 84-1117 of the Statutes of Arkansas, contained this language:

"Upon the sale of any land, town or city lot, or part thereof for taxes then due, if such sale should prove invalid on account of any informality in the proceedings of any officer having any duty to perform in relation thereto, the purchaser at such sale shall be entitled to receive from the proprietor of such land or lot the amount of taxes for which such land was sold, and the amount of taxes paid thereon by the purchaser subsequent to such sale, and such land or lot shall be bound for the payment thereof" * * *.

EXHIBIT B-4

Section 1257, subsections (2) and (3), of Title 28 of the United States Code contains this language:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) * * *

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any

title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

EXHIBIT B-5

Section 2103 of Title 28 of the United States Code provides:

"If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State in a case where the proper mode of a review if by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if only presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondant reasonable damages for his delay, and single or double costs."

EXHIBIT B-6

Act No. 142, approved March 20, 1935, repealed March 13, 1937, which is assailed as being repugnant to the Fourteenth Amendment to the Constitution of the United States, reads as follows:

"Whenever the State and County Taxes have not been paid upon any real or personal property within the time provided by law, and publication of the notice of sale has been given under a valid and proper description, as pro-

vided by law, the sale of any real or personal property for the non-payment of said taxes shall not thereafter be set aside by any proceedings at law or in equity because of any irregularity, informality or omission of any officer in the assessment of said property, the levying of said taxes, the making of the assessor's or tax book, the making or filing of the delinquent list, the recording thereof, or the recording of the list and notice of sale, or the certificate as to the publication of said notice of sale; provided, that this Act shall not apply to any suit now pending seeking to set aside any such sale, or to any suit brought within six months from the effective date of this Act for the purpose of setting aside any such sale."

EXHIBIT B-7

The pertinent portion of Act No. 264, approved March 13, 1937, repealing Act 142 of 1935, simply provided that it be enacted —

"That Act 142 of the Acts of 1945 be and the same is hereby repealed."

EXHIBIT B-8

The pertinent part of Section 70(a) of the bankruptcy act, 11 U.S.C.A. 110(a), reads as follows:

"The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title" * * *.

EXHIBIT B-9

Section 64(a) of the bankruptcy act, 11 U.S.C.A. 104(a), which designates what debts may be proved in bankruptcy, and fixes their priorities, contains the following language with respect to taxes:

"The debts to have priority, in advance of the payment of dividends to creditors, and the order of payment, shall be" * * * (1), * * * (2), * * * (3), * * * (4) "taxes legally due and owing by the bankrupt to the United States or any state or any subdivision thereof:" * * *

EXHIBIT B-10

Section 57(n) of the bankruptcy act, 11 U.S.C.A. 104(a), as amended by the Act of May 27, 1926, which fixes the time within which claims may be proved in the bankruptcy court, provided, at the time of the transactions under review in this action that —

"Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication" * * *

EXHIBIT B-11

Section 5 of Article 16 of the Constitution of Arkansas provides:

"No tax shall be levied except in pursuance of law."

EXHIBIT B-12

Act 92 of 1887, amended on several occasions, and incorporated in our official Codes as sections 7086 of

Kirby's Digest, 13846 to 13848 of Pope's Digest and 10085 of Crawford & Moses' Digest, the form in which the provision was in effect at the time of the transactions under review, provided:

"The Clerks of the several Counties of this State shall cause the list of delinquent lands in their several counties, as corrected by them, to be published weekly for two weeks, between the second Monday in May and the second Monday in June in each year. Such list of delinquent lands shall be published in some newspaper of that county, if any be published therein; if not, in some newspaper published nearest to said county having a circulation in such county. There shall be attached to said list a notice that said delinquent lands will be sold by the county collector; said notice shall be in substance as follows:

"DELINQUENT TAX SALES

"The lands and lots and parts of lots returned delinquent in _____ county for the year 18____, together with the tax and penalty charged thereon agreeably to law, are contained and described in the following list, viz: [Here insert the list with the names of the owners, as the same are described in said list as taken from the tax-books]. And notice is hereby given that said several tracts, lots or parts of lots, or so much thereof as may be necessary to pay the taxes, penalty and cost due thereon, will be sold by the county collector, at the courthouse in said county, on the second Monday in June next, unless the said taxes, penalty and costs be paid before that time; and that the sale will be continued from day to day, until the said tracts, lots and parts of lots be sold.

"[Date of Notice] _____ Clerk

"_____ County

"The Clerk of the County Court shall record said list and notice in a book to be by him kept for the purpose, and shall certify at the foot of said record, stating in what newspaper said list was published, and the date of publication, and for what length of time the same was published before the second Monday in June then next ensuing, and such record, so certified, shall be evidence of the facts in said list and certificate contained."

EXHIBIT B-13

Section 9 of Act 172 of 1929, approved March 22, 1929, under which the assessments on which the forfeiture of the lands involved in this action were based, amended Section 9879 of Crawford & Moses' Digest to make the pertinent portions read:

"As soon after the passage and approval of this Act as is practicable, * * * and on or before the first day of January, 1930, and at the same time each even numbered year thereafter, he" (the Clerk of the County Court of each County) "shall make out and deliver to the assessor, in books prepared for that purpose, an abstract containing a description of each tract of land situated outside the boundaries of any city or town and additions thereto, * * * and said abstracts, in each case, shall show the name of the owner, if known, and the number of acres or quantity of land contained in each call * * *, *provided, that not more than one-sixteenth section or the approximate thereof shall be entered under* one call" (Italics supplied).

EXHIBIT B-14

Section 1 of Act 72 of 1931, approved March 2, 1931, amended Section 9 of Act 172 of 1929, supra, in that, in lieu of the italicized language of the proviso in Act 172, language was used which authorized the —

"setting down all the subdivisions of each section as they belong to different individuals, *or the whole section together if owned by one person and not divided on account of parcels being different in value.*" (Italics supplied).

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1958

NO. 291

MURRAY WHITFIELD COULTER and
GEORGE PROTHRO COULTER ..... Appellants

V.

GARLAND ANTHONY, FAY FURLOW, JAMES ABBOTT, FURLOW-ABBOTT COMPANY, a Corporation, RUTH JONES PUDEPHATTE, LIZZIE LOU JONES PUDEPHATTE, JAMES DAVID JONES, WILLIAM R. ARENDT, EUGENE F. GALLOWAY, EDWIN WILSON ANTHONY, LOUISE J. ANTHONY, E. H. GILL and M. B. GARRISON ..... Appellees

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF ARKANSAS

MOTION TO DISMISS

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---

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF ARKANSAS

MOTION TO DISMISS

Appellees move to dismiss the appeal herein on the grounds;

(1) That the appeal does not present a substantial federal question; (2) That the judgment rests on an adequate non-federal basis.

OPINION BELOW

The opinion of the Arkansas Supreme Court from which comes this appeal appears in appellants' Jurisdictional Statement as Exhibit A-3, (p. 16). The opinion on rehearing, Exhibit A-5 (p. 27). Judgment in Substitution, Exhibit A-6, (p. 28).

QUESTIONS PRESENTED

The questions presented in this appeal are:

(1) Whether the sale of the lands by the Sheriff for non-payment of taxes was void, and whether the sale, if void, was cured by Act 142 of the 1935 Session of the Arkansas Legislature.

(2) Whether the sale of the lands by the Sheriff for non-payment of taxes was void because the lands, at the time of the sale, were assets in the hands of the trustee in a Court of Bankruptcy.

(3) Whether the operation and effect of Act 142 of 1935, violates the provisions of the Fourteenth Amendment to the Constitution of the United States.

(4) Whether the sale of six, forty-acre parcels, in three lots of eighty acres each, was without statutory authority and in contravention to the provisions of Section Five of Article Sixteen of the Constitution of Arkansas and to applicable decisions of the Supreme Court of the United States.

STATUTES INVOLVED

Act 142 of 1935. Approved March 20, 1935.
Jurisdictional Statement, Ex. B-6 (p. 38)

Act 264 of 1937. Approved March 13, 1937.
Jurisdictional Statement, Ex. B-7 (p. 39)
Ark. Statutes 1947. Sec. 84-415
(Act 172 of 1929)
Ark. Statutes 1947. Sec. 84-447
(Act. 172 of 1929)
Ark. Statutes 1947. Sec. 84-802
(Crawford & Moses Digest 10010)
Ark. Statutes 1947. Sec. 84-807
(Act No. 16, Extra Session 1933)
Ark. Statutes 1947. Sec. 84-901
(Crawford & Moses Digest 10026)
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(Crawford & Moses Digest - 10108)
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(Crawford & Moses Digest - Sec. 10109)
Ark. Statutes 1947. Sec. 84-1314
(Crawford & Moses Digest - Sec. 10112)
Ark. Statutes 1947. Sec. 10-925
(Crawford & Moses Digest - Sec. 6682)

STATEMENT OF THE CASE

The particular lands involved in this appeal were listed in the assets of Harris Bros., adjudged a bankrupt on January 23, 1932. The lands were conveyed by the Trustee in Bankruptcy to Prothro, August 17, 1933. Appellants claim under a deed from Prothro. Appellees' predecessors

in title received tax deeds from the Commissioner of State Lands for the State of Arkansas, on November 25, 1935, and March 26, 1936. By Statute, (Sec. 10-925, Ark. Statutes 1947, Sec. 6682, Crawford & Moses Digest) these deeds are prima facie evidence of title.

The lands were sold in June, 1932, by the Sheriff for non-payment of taxes, to the State, for the taxes assessed and levied and extended in 1931. The state's lien for taxes attached on the first Monday in June, 1931. (Act of March 24, 1911. Crawford & Moses Digest, Sec. 10023). The lands were subject to redemption during a period of two years after June, 1932, (Crawford & Moses Digest, Sec. 10096) and not having been redeemed were certified by the Clerk to the State Land Commissioner (Ark. Statutes, 1947, Sec. 84-1314, Crawford & Moses Digest, 10112).

The Arkansas Constitution, Section 5 of Article 16, provides: "No tax shall be levied except in pursuance of law." The procedure for assessing, levying and collecting taxes is provided by Statutes, as well as the procedure for selling lands for non-payment of taxes.

Prior to the passage of Act 142 of 1935, the Courts had consistently declared sheriffs' sales of land for delinquent taxes to be void for irregularities or omissions occurring in assessing the lands and in the preparation of the tax books and in the advertising and sale of the lands.

Act 142 was designed to prohibit the Courts from setting aside tax sales on account of any such irregularity, informality or omission of any officer in connection with the assessment, levying of taxes, filing and recording of the de-

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In 1931, 1932 and 1933 Crawford & Moses Digest was the official Digest of Arkansas Statutes.

linquent list and published the notice of sale, etc. Act. 142 was repealed in 1937, but in Wood v. Lovett, 85 U. S. L. Ed. 1404. 313 U.S. 362 it was held that the act was operative as to lands sold by the State Land Commissioner while the act was in effect.

The tax sale occurred while these lands were assets of the bankrupt in the hands of the trustee. No claim for taxes was filed in the Bankruptcy Court, and no action was taken by the Trustee to prevent the sale of the lands for the delinquent taxes. Instead, when the Trustee had under consideration the sale of these lands to Prothro the delinquent taxes were considered, and the decision of the Trustee was to sell the lands subject to the outstanding taxes. At the time the lands were sold on August 17, 1933, the purchaser still had until June, 1934, to redeem the land by payment of the taxes due, plus interest, and the cost of the sale.

When the lands were sold for taxes, certain tracts which had been assessed as six separate forty acre parcels were combined and sold as three eighty acre tracts. The amount of the total tax was the same, and the cost of the sale was less by combining the tracts in that manner, and the land owner suffered no ill advantage.

ARGUMENT

No Substantial Federal Question is Presented

The federal questions on which appellants rely relate to: (1) Whether the tax sale was void because the lands were in custodia legis. (2) Whether the tax sale was void on account of jurisdictional defects in the sale as distinguished from irregularities and omissions.

CUSTODIA LEGIS

The mere fact that these lands were assets in the hands of the trustee in bankruptcy, and to that extent were in custodia legis, does not render the tax sale void. The bankruptcy court has adequate authority to protect the property that comes into its custody, and also has great flexibility in disposing of such property. If the possession of the trustee is interfered with, the Court has authority to enjoin such interference. In the case of tax sales the bankrupt court, on notice and after a hearing, can cancel the lien for taxes and require that claims for the taxes be filed in the bankrupt court. This is the procedure that must be followed where land subject to the State's tax lien is sold, free of liens. On the other hand the bankrupt court may sell the lands subject to the tax lien, in which case the bankruptcy court disclaims all responsibility for the taxes and the taxing authority may resort to foreclosure of its tax lien. U.S.C.A. Title 11, Bankruptcy Sec. 110, Note 1387, Incumbered property. Cases cited.

This is the effect of the decisions in Dayton vs. Stanard 241 U. S. 588 Eppstein vs. Orahood, 156 Fed. 42, 17 L.R.A.-NS, 465.

The enforcement of the State's lien for taxes in Arkansas is not like that of many states where direct action is necessary to enforce the tax lien. In this case the State's lien for taxes attached the first Monday in June, 1931. (Crawford & Moses Digest, Sec. 10,023). This was prior to the adjudication in bankruptcy. The tax sale was held in June, 1932, but no title passed under the tax sale until two years later, when the time for redemption had expired, and the lands were certified by the Clerk to the State Land Commission. Ark. Stats. 1947, Sec. 84-1314;

Crawford & Moses Digest, Sec. 10112; Crawford & Moses Digest, 10096.

A sale by a trustee in bankruptcy is a judicial sale, and the purchaser is bound to know that all that the receiver or trustee sells is his right, title and interest, and the purchaser takes subject to outstanding liens and interests unless they were divested by an order of sale, free of liens. The liability, as between the trustee in bankruptcy and the purchaser at a sale made by him, for taxes accruing during the pendency of the administration of the bankrupt's estate, depends upon the terms of the sale. 6 Am. Jur., P. 1272, Bankruptcy Sec. 1210; Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734, 75 U. S. L. Ed. 645, Annotation p. 651.

The bankruptcy court has the power to order the sale of assets of the estate in the custody of the Court, subject to existing liens. This would transfer to the purchaser the interest of the estate, only leaving it to the purchaser to contest the claims of third persons.

A Court or bankruptcy has authority to order a sale by the trustee, free and clear of all liens and encumbrances, with provisions for the transfer of liens to the proceeds of the sale. 6 Am. Jur., P. 1274, Bankruptcy Sec. 1213, 1214, 1215.

In his findings, the Chancellor who tried the case, referred to the minutes of the Referee in Bankruptcy, dated July 12, 1933, and quoted the following statement: "There is a cloud on the title and there are a lot of past due taxes, amounting to some thousand dollars that have got to be paid", and continued, "the lands will be sold subject to all that. I do not see any other way it could be handled except to sell what ever right or title the trustee had." (Appellants brief, Appendix A, P. 7). If the sale of these

lands to Prothro by the trustee was intended to be free and clear of liens, it would have been necessary to notify the State and to provide for the payment of taxes out of funds in the bankruptcy Court. In re Reading Hat Manufacturing Company, 224 Fed. 786, and Wiswell vs. Sampson, 14 HOW. 52 (1852). In re Pennsylvania Central Brewing Company, 135 F. 2d, P. 60.

Without any question the record shows that the lands were sold subject to the tax lien, and that only the trustee's equity passed under the sale. This appears from the minutes of the Referee at pages 184 through 198 of the transcript. The trustee's Report of Sale recited that the trustee had an offer of "$2500.00 in cash from E. W. Prothro for the equity of the trustee in the remaining assets". These assets were stated by the trustee to include: "All real property of the bankrupt subject to the delinquent taxes now against the same". The trustee was ordered to convey to E. W. Prothro "all the right, title and interest of the trustee for the estate of Harris Brothers ..." and to all of the real property of the estate ... but subject to delinquent taxes as adverse claims, said real estate being specifically described as follows:" (Original Tr. 292).

The Arkansas Supreme Court, in its opinion discussing the question of whether the tax sale interfered with the bankruptcy court's control of the property, said: "In the Harris Bros. matter, the bankruptcy court made no effort to set aside the collector's sale. To the contrary, the order authorizing the trustee's sale to Prothro expressly made it subject to the delinquent taxes against the land. It is quite apparent that the tax sale did not interfere, in any way, with the bankruptcy court's control of the property."

The fact that the property was sold by the bankrupt court subject to the lien for taxes, eliminates completely

the federal question, so far as the subject of custodia legis is concerned.

VALIDITY OF TAX SALE

Jurisdictional Defects as Distinguished from Irregularities and Omissions

Before the passage of Act 142 of 1935, the Arkansas Courts would have held a tax sale to be void if it could be shown that there were any irregularities, omissions or jurisdictional defects involved. While Act 142 was in effect the Courts were prohibited from voiding tax sales for mere irregularities or omissions, but when jurisdictional defects were proven, the sale would be declared void. (Cecil vs. Fisher, 206 Ark. 962; 178 S.W. 2d, 655; Sanderson vs. Walls, 200 Ark. 534; 140 S.W. 2d, 655; Burbridge vs. Crawford, 195 Ark. 191; 112 S.W. 2d, 423.

The distinction between jurisdictional defects and irregularities and omissions has not always been easy. The inclusion of an unauthorized tax would be jurisdictional, as would the complete failure to publish the notice of sale; but the failure of the Clerk to make his certificate of publication before the day of sale is a mere irregularity. (Carle vs. Gehl, 193 Ark. 1061; 104 S.W. 2d, 445; Foster vs. Reynolds, 195 Ark. 5; 110 S. W. 2d, 689; Wallace vs. Todd, 195 Ark. 134; 111 S.W. 2d, 472; Lumsden vs. Erstine, 205 Ark. 1004; 172 S. W. 2d, 409)

The irregularity in the sale for taxes complained of by appellants is that the Clerk failed to record the notice of sale and attach his certificate to the delinquent tax list before the day of sale. The Courts have repeatedly held that this is a mere irregularity or omission, and not a jurisdictional defect.

The determination of matters of this kind does not present a Federal question.

THE SALE OF THE LANDS IN PARCELS OF EIGHTY ACRES INSTEAD OF FORTY ACRE TRACTS

The combining of two forty-acre tracts into one eighty-acre tract for the purpose of sale was not a jurisdictional defect, but was merely an irregularity which was cured by Act 142. Sec. 9 of Act 172 of 1929 (appellant's brief, Exhibit B-13) cited by appellant, relates only to the preparation of the real estate book for use by the assessor. Under the law, the separate parcels listed in that book are valued or assessed by the assessor. This book is returned to the Clerk and from it, the Clerk makes up the tax books. But where the ownership is the same and values are the same, the Clerk may combine the parcels and extend the taxes against the whole tract. Sec. 1 of Act 72 of 1931 (appellant's brief, Exhibit B-14) is cited by appellants to support their contention that the assessment was defective, but appellants neglected to set out in their Exhibits B-13 and B-14 one paragraph in the sections from which they quote. The omitted paragraph reads: "No failure to observe any of these requirements shall be held to vitiate any assessment if the lands be so described as to be identifield." (Sec. 1 Act 72, 1931; Sec. 9, Act 172, 1929.)

The Arkansas Supreme Court, in its opinion, held that the act of the Clerk in combining the 40 acre tracts, for the purpose of extending the tax, and the sale of the tracts in 80 acre parcels was only an irregularity and was cured by Act 142 of 1935. The Court's reasoning is quite sound.

The cases cited contra by appellants, Cocks vs. Simmons, 55 Ark. 104; Harris vs. Brady, 87 Ark. 428; Dansby

vs. Weeks, 199 Ark. 497; deal with a state of facts entirely different, and have no application.

CONSTITUTIONAL QUESTIONS

The constitutional question was raised for the first time in the petition for re-hearing, but that question has already been settled in Woods vs. Lovett, 313 U.S. 362. In that case it was held that notwithstanding the repeal of Act 142 by the Legislature in 1937, it constituted a bar to any action to set aside a sale for taxes on account of irregularities, when the lands were sold by the state while Act 142 was in effect.

It has already been recognized and conceded in the State court that some of the land that was sold by the trustee in bankruptcy is open to attack because of irregularities in the sale for taxes, but that land was sold by the State Land Commissioner after Act 142 of 1935 was repealed, and was not afforded the protection that attached with respect to the lands involved in this appeal. The State Supreme Court reversed the trial court as to the one tract not cured by Act 142 and remanded the case to the Chancery Court for further proceedings with respect to that tract. (Appellant's Exhibit A-6, Jurisdictional Statement).

Attention should be directed to the comments on Judge Miller's decision (Exhibit A-7, Jurisdictional Statement). This decision makes no mention of Wood vs. Lovett, and it does not appear that the order of the bankruptcy court selling these lands, subject to the tax liens, was brought to the attention of the Court. We do not know what Judge Miller's decision would have been had these things been called to his attention.

CONCLUSION

The constitutional question relating to application of Act 142 of 1935, which presents the only substantial federal question in the case, has been foreclosed by the former decision of this Court in Wood v. Lovett. King v. West Virginia, 216 U. S. 92; 54 L. Ed. 396; Equitable Life Assurance Society v. Brown, 187 U. S. 308; 47 L. Ed. 190.)

The decision of the state court rests upon non-federal ground adequate to support the decision. (U.S.C.A. Title 28, Sec. 1257, Note 62; Utley v. City of St. Petersburg, Fla., 292 U.S. 106; 78 L. Ed. 1155; Arkansas Southern R. Co. v. German National Bank (Ark.), 207 U.S. 270; 52 L. Ed. 201).

The decisions of the state court construing the statutes regulating the assessment, levy, and collection of local taxes are binding on the Supreme Court of the United States. (U.S.C.A. Title 28, Sec. 1257. Cases cited in notes 63, 64 and 65.)

Since the constitutional question has already been decided and there is no other substantial federal question involved, and the decision of the State Supreme Court is based on non-federal questions, the motion to dismiss should be sustained.

Respectfully submitted,

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vs.

GARLAND ANTHONY ET AL, ... Appellees

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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BRIEF IN OPPOSITION TO MOTION TO DISMISS

GROUNDS ASSIGNED IN SUPPORT OF MOTION

Appellees move the Court to dismiss the appeal in this case for the reasons, as we understand them, that no substantial question is presented in that:

1. The defects asserted by appellants as rendering

the sale involved herein void were not jurisdictional defects but mere irregularities cured by Act 142 of 1935;

2. "The decision of the state court rests upon non-federal grounds adequate to support the decision";

3. "The constitutional question was raised for the first time in the petition for rehearing"; and

4. "The constitutional question * * * has been foreclosed by the former decisions of this Court" * * *.

REASONS WHY MOTION SHOULD BE DENIED

The motion to dismiss should be denied for the following reasons:

1. *The defects relied on by appellants were not mere irregularities cured by Act 142 of 1935, but were jurisdictional defects that the state was without power to cure by legislative enactment;*

2. *The decision of the state court does not rest on any adequate independent non-federal ground;*

3. *The constitutional question was adequately and timely raised;*

4. *The constitutional question presented is not foreclosed by the former decisions of this Court.*

ARGUMENT

1. *The defects relied on by appellants were not mere irregularities cured by Act 142 of 1935, but were jurisdictional defects that the state was without power to cure by legislative enactment.*

The defects relied on by appellants were incorporated as reasons "(1)", "(2)" and "(3)" of question "1", as set out in the Jurisdictional Statement, reason "(1)" dealing with the federal question of the result of the sale of the lands in question while they were in the custody of the bankruptcy court, without leave of that court, and for a claim provable in bankruptcy, but never proved or filed in the bankruptcy court; and reasons "(2)" and "(3)" dealing with the effect of the failure of the clerk to execute and file his certificate to the proof of the notice of sale within the time required by statute, and the effect of the sale of six of the forty-acre parcels that had been separately assessed pursuant to the mandatory provision of the controlling statute, but which were extended by the clerk on the tax records as three parcels of eighty acres each for the combined tax against both forties, and were so sold in combination by the sheriff.

It is not desired to supplement or enlarge upon what is said in the Jurisdictional Statement as to reason "(1)" of question "1", as set out in the Statement, dealing with the federal question; and reasons "(2)" and "(3)" will be discussed together, confining the discussion to cases that hold that the interest of appellants was a vested interest and that the defects here involved were jurisdictional ones that the state did not have the power to cure by legislative enactment.

That the interest of appellants was a vested interest

does not seem open to question, and probably needs no citation of authority. The doctrine is well stated in *Stewart* v. *Comanche Mercantile Co.*, 147 S.W. 1166 (Tex. Civ. App.):

> "The right to redeem is a property right which the trustee, of course, could have exercised [Re East Stroudsburg Supply & Construction Co., 248 F. 356 (D.C.); Fort Dearborn Trust & Savings Bank v. Smalley, 298 F. 45 (C.A. 8); In re Argyle-Lake Shore Building Corporation, 78 F. (2d) 491 (C.A.); Re Charles Hotel Co., 12 F. Supp. 736 (D.C.)]; and it was a right which the trustee might have exercised or have sold to someone else."

The rule seems well settled under the Arkansas decisions, both before and after the enactment of Act 142. It has always been the rule there that a meritorious defense could not be cut off by later legislation. It was so held in *Radcliffe* v. *Scruggs*, 46 Ark. 96, where it was said: "And by a meritorious defense we mean any act or omission of the revenue officers in violation of law and prejudicial to his rights or interests, as well as those jurisdictional and fundamental defects which affect the power to levy the tax, or to sell for its nonpayment." In *Cooper* v. *Foreman Lumber Co.*, 61 Ark. 36, 31 S.W. 981, where a curative act was asserted as curing the defect here asserted under reason "(2)", the above rule was cited with approval, and the court added: "As indicated, under this holding, Section 13874 did not, and could not, cut off appellant's meritorious defense in the tax sale in question." In *Smith* v. *Spillman*, 135 Ark. 279, 205 S.W. 107, it is said that "We are of the opinion that * * * to extend the right of redemption beyond the period under the law as it stood at the time of the sale would be an impairment of the obligation of the contract, which is expressly forbidden, not only by the Constitution

of this state (Article 2, §17) but likewise by the Constitution of the United States." In this case, the period guaranteed to appellants under the state statute within which to bring their action was cut off. In *Carle* v. *Gehl*, 193 Ark. 1061, 104 S.W. (2d) 445, it was held that the total failure of the Clerk to file the certificate to the publication of the notice of sale was not cured by Act 142. In *Cecil* v. *Tisher and Friend*, 206 Ark. 962, 178 S.W. (2d) 655, it is said: "Did the failure of the clerk to attach his certificate * * * prior to the dates of sale, void the sale here in question? We think the failure of the Clerk to perform his duty as required by Section 13848 of Pope's Digest did avoid these sales, and was a jurisdictional defect." In *Standard Securities Co.* v. *Republic Mining & Mfg. Co.*, 207 Ark. 335, 180 S.W. (2d) 575, in which a curative act similar to the one here relied on by appellees was interposed as a defense, the court again quotes Radcliffe v. Scruggs with approval and adds: "As, indicated, under this holding, Section 13874 did not, and could not, cut off appellant's meritorious defense to the tax sale in question."

The question is no less firmly settled on the effect of the selling of the six forty-acre parcels separately assessed as three parcels of eighty acres each for the combined tax against both. The cases of the eighteen states that have passed on this point have been reviewed; and, insofar as we have been able to find, this case stands alone in sanctioning such a sale, whether the sale was of a single parcel for a tax not directly assessed against it, or a sale in combination of parcels separately assessed. In all cases, the rule seems to be that announced in *Cocks* v. *Simmons*, 55 Ark. 104, 17 S.W. 594, mentioned at page 19 of the jurisdictional statement. To the same effect are the later Arkansas cases. In *Bonner* v. *Board of Directors of St. Francis Levee Dis-*

trict, 77 Ark. 519, 92 S.W. 1124, it is said that "The statutes of this state provide * * * that lands shall be described on the delinquent lists as they are described in the tax books; and, impliedly, that they shall be sold in the same manner. Kirby's Dig. §§6976, 7024, 7083, 7085. The effect of these statutes is to prohibit the collector or other persons from changing the assessment of lands after the taxbooks have been delivered to the proper officer. The assessor is authorized only to make the assessment." To the same effect are *La Cotts* v. *Quertermous*, 83 Ark. 174, 103 S.W. 182; *Harris* v. *Brady*, 87 Ark. 428, 112 S.W. 974; *Chatfield* v. *Iowa & Ark. Land Co.*, 88 Ark. 395, 114 S. W. 473; *Belcher* v. *Harr*, 94 Ark. 221, 126 S.W. 714; *Fordyce* v. *Vickers*, 99 Ark. 500, 138 S.W. 1010; *Carle* v. *Gehl*, 193 Ark. 1061, 104 S.W. (2d) 445, where a curative act was invoked ("It is true, each separate lot was correctly described, but they were not assessed separately as provided by law, but together as one tract under a single valuation and were sold en masse for a lump sum. * * * We do not think that the assessment of the six lots as one tract was a valid and proper description, and, for this reason, appellant is in no position to invoke the curative features of the Act. We think any one of the foregoing reasons [one was a failure to file the certificate before the day of sale] * * * is sufficient to make the act inapplicable and to sustain the decree of the Court below"); *Moseley* v. *Georgia State Association*, ____ Ark. ____, 224 S.W. 619; *Hires* v. *Douglas*, 198 Ark. 559, 229 S.W. (2d) 959; *Dansby* v. *Weeks*, 199 Ark. 497, 235 S.W. (2d) 62.

2. *The decision of the state court does not rest on any adequate independent non-federal ground.*

It is conceded that the Supreme Court of the United States will not review an alleged constitutional infringe-

ment by a state court if the "decree of the state court rests upon a non-federal ground broad enough to support it." But what is the independent non-federal ground broad enough to support the decree in this case? Appellees do not tell us, and the cases cited by them in support of their assertion give us no hint of any such ground. There is no such independent or sufficient non-federal ground in this case. A decision in favor of appellants on either one of the reasons assigned under question "1" as set out in the Jurisdictional Statement would have entitled appellants to prevail. A failure to sustain either one would have been fatal to appellees' defense. A decision on each of the points was necessary. Neither was independent of the basic issue as to appellees; and, since the Federal question with respect to the sale of the lands without leave of the bankruptcy court while they were in the custody of that court would have been determinative of the outcome, it would not be important if there had been state grounds which, in the absence of the Federal question, might have sustained the judgment. All three of the issues were so interwoven with the Federal question as to become an integral part thereof and thus remove any independent or adequate status from either or all of them. * * * "Where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain." *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U.S. 157, 164, 61 L. Ed. 644, 649; *Postal Tel. & Cable Co.* v. *Newport*, 247 U.S. 464, 475; *Davis* v. *Wechsler*, 263 U.S. 22, 24; *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282.

3. *The constitutional question was adequately and timely raised.*

The suggestion that "the constitutional question was raised for the first time in the petition for rehearing" (p. 11 of motion) is not stressed by appellees. In any event, the question would have been without merit for two reasons: (1) the constitutional question was sufficiently raised in the state courts even without a petition for rehearing; and (2), if it had not been so raised, the question, under the circumstances of this case, was raised in apt time in the petition.

(1) The question of the effect of the sale of the lands while they were in the custody of the bankruptcy without leave of that court is a federal question on which this court would not be bound by the construction of the state court, but on which the ultimate construction must rest with this court. *New Jersey* v. *Anderson*, 203 U.S. 483, 491; *Kalb* v. *Feuerstein*, 308 U.S. 433; 438; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 483. This question was specifically raised by appellants in their original complaint (R. 2). It was discussed (Ex. A-1, Ap. 5) but not decided by the trial court. It was discussed in the opinion of the State Supreme Court (R. 122-130, V. I., Ex. A-3, Ap. 17-18) and actually decided adversely to appellants (Ap. 17-18, 27) and in a manner in conflict with the decisions of this court (Jur. St. 12-15). This brings the question squarely in line with the requirements of this court for review on certiorari.

The holding of the State Supreme Court on the effect of the failure of the Clerk to file his certificate before the day of the sale to the effect that, "In the absence of a curative act this defect renders the sale void", necessarily involves a federal question which was decided adversely to

appellants. This issue is, likewise, subject to review on certiorari, omitting entirely the effect of its being interwoven with the constitutional question. On this point, the State Supreme Court said (R. 122-130, V. I., Ex, A-3, Ap. 18): "The question is whether the Clerk's belated execution of the certificate was an irregularity cured by Act 142, or a jurisdictional defect lying beyond the remedial power of the legislature?" The same question, if not explicitly asked, is clearly inferable with respect to the manner of the selling of the six forty-acre parcels. What was it that could have made these defects "a jurisdictional matter lying beyond the remedial power of the legislature?" There is but one answer: the due process clause of the Fourteenth Amendment to the Federal Constitution. Here are necessarily embodied the essential elements of the constitutional question presented. Did the State Supreme Court understand this? We must indulge the presumption that it did so understand. The holding that the defects assailed were mere irregularities cured by Act 142 was, in substance and in fact, a decision upholding the validity of the act adversely to the rights of appellants as against the necessarily implied constitutional prohibition of the due process clause above mentioned.

There is no set formula or collection of words required to raise a federal constitutional question, or to constitute a sufficient decision thereon to confer on this Court jurisdiction to review. The very early case of *Craig* v. *The State of Missouri*, 4 Pet. 410, 423-429, in which an almost identical procedural situation was presented, is particularly in point here. In the Craig case, no mention whatever of the state act was made in the pleadings, the only mention at all being the casual mention by the trial court in its judgment to the effect that the transaction involved was pur-

suant to "an Act of the Legislature * * * approved the 27th day of June, 1821, entitled" * * *. This court held that sufficient, since the question was necessarily involved. Other cases supporting the contention here made are *Bridge Proprietors* v. *Hoboken Land and Improvement Co.*, 1 Wall. 116, 141-142; *Furman* v. *Nichol*, 8 Wall. 44, 56; *Kaukauna Water Power Co.* v. *Green Bay Mississippi Canal Co.*, 144 U.S. 254, 269; *Cissna* v. *Tennessee*, 246 U.S. 289; *New York* v. *Zimmerman*, 278 U.S. 63; *Indiana* v. *Brand*, 303 U.S. 95, 98.

(2) No question is raised as to the sufficiency of the petition for rehearing. It is merely suggested (and it is a suggestion only) that "the constitutional question was raised for the first time in the petition for rehearing."

In this case, the trial court passed on none of the issues presented in this appeal. The State Supreme Court passed on the federal question arising under the national bankruptcy act for the first time in its history, and in a manner apparently in conflict with the decisions of this Court, and with the decisions of the appellate federal Courts generally for the last quarter century; held, for the first time in its history that a curative act validated a tax sale concededly void at the time it was made; and held, for the first time, insofar as we have found, that, in substance, a sale of lands for taxes not assessed against them was a mere irregularity cured by Act 142 of 1935. The following cases hold that, in cases involving the foregoing elements, the raising of the constitutional question for the first time in a petition for rehearing, motion in arrest of judgment, or other similar pleading, is timely: *Consolidated Coal Co.* v. *Illinois*, 185 U.S. 203, 205-6; *Sullivan* v. *Texas*, 207 U.S. 416, 422; *Illinois Central Railroad* v. *Kentucky*, 218 U.S. 551, 555-6; *Saunders* v. *Shaw*, 244 U.S. 317, 320; *Ohio* v. *Akron Park*

District, 281 U.S. 74; *State of Missouri* v. *Gehner*, 281 U.S. 313, 320; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 677-8; *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 356; *Herndon* v. *Georgia*, 295 U.S. 441, 444. The rule is too well settled to merit argument.

If the offending act had not been specifically brought in question in the pleadings in the trial court; if the constitutional question had not been necessarily involved and necessary to a decision; if the State Supreme Court had not, in fact, passed on the question — still, in view of the procedures followed by the State Supreme Court on January 20, 1958, in entertaining the petition for rehearing, in setting aside the original decree of November 4, 1957, in writing a supplemental opinion on the petition for rehearing, and reentering a final decree, it seems that all question as to the timeliness of the raising of the constitutional question should pass out of the case.

We should not worry overmuch about what (Motion 11) was not called to Judge Miller's attention in the companion case tried before him. The bankruptcy proceeding had been conducted in the court over which he presided. The complete records, of which he would have taken judicial notice, were before him. One reason for his not mentioning Wood v. Lovett could have been that he did not put the same construction on it that appellees seem to do.

4. *The constitutional question presented is not foreclosed by the former decisions of this Court.*

Appellees, in support of their assertion on this point, cite *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308; *King* v. *West Virginia*, 216 U.S. 92; and *Wood* v. *Lovett*, 313 U.S. 362. These cases do not support appellees'

assertion that "the constitutional question * * * has been foreclosed by the former decisions of this Court."

The decision in the Brown case does not touch the point at issue in this case. The question in that case was whether a judgment in favor of an administrator on an insurance policy rendered by the Supreme Court of the Territory of Hawaii should be declared invalid by reason of the fact that, at the time such judgment was rendered, there was a suit pending on the same policy in a New York Court brought by an administrator appointed in that state. This Court did uphold "the power to consider and sustain a motion to affirm * * * where the assignments of error on the merits are obviously and unquestionably frivolous," but there is nothing in the opinion that remotely indcates that the questions here presented are frivolous.

The decision in *King* v. *West Virginia*, 216 U.S. 92, is no more helpful than in the decision in the Brown case. The issues in the King case were entirely different from the issues in this case. The King case turned largely on a question of res judicata.

With respect to the decision in *Wood* v. *Lovett*, 313 U.S. 362, but little can be added, within our limitations, to what was said in the Jurisdictional Statement (p. 26). In the Wood case (p. 365), "It was agreed on all hands that, though these irregularities would have constituted grounds for avoiding the sale but for the provisions of the Act of 1935, *they would not have been available to the appellee if the Act were still in force*" (Italics supplied). In the present case, it is asserted, and supported by the authorities, that the irregularities were not such as would have been cured by the Act of 1935, but that they were jurisdictional defects that were not, and could not have

been, cured by any legislative enactment. The decision in the Wood case did nothing more than to reaffirm the rule that a vested title cannot be divested by later legislation, whether such later legislation is by enactment or repeal.

If the state has the power, as against a plea of lack of due process, to enact legislation which cuts off or cuts short the time guaranteed to the owners under a statute in force at the time of the enactment of such legislation within which, because of their disability of minority, they may bring their action to redeem, and which legislation, through an ex parte tax proceeding, divests the title of such minors, which they held at the time of the enactment of such legislation, then, indeed, is there no substantiality to the question here presented; but, since the validity of a state statute, for whatever reason assigned, cannot be sustained if its effect is to overturn rights vested at the time of the enactment of such statute, it is respectfully submitted that the motion to dismiss should be denied.

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